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Nos. 04-166, 04-446

Supreme Court, U.S.
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In The
Supreme Court of the United States

FRED LOVELL, *et al.*,

Petitioners,

v.

JOSEPH S. COCHRAN and BRENDA S. COCHRAN,

Respondents.

ANN VENEMAN, Secretary, United States Department of Agriculture, *et al.*,

Petitioners,

v.

JOSEPH S. COCHRAN and BRENDA S. COCHRAN,

Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF RESPONDENTS

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BRIEF IN OPPOSITION

Respondents Joseph and Brenda Cochran, by counsel, respectfully request that this Court deny the petitions for writs of certiorari seeking review of the Third Circuit's opinion in this case.

OPINIONS BELOW

The opinion of the court of appeals (Petitioners' Appendix in No. 04-446 (hereinafter "Gov. Pet. App.") 1a-34a) is reported at 359 F.3d 263 (3rd Cir. 2004). The opinion of the district court (Gov. Pet. App. 35a-53a) is reported at 252 F. Supp. 2d 126 (M.D. Pa. 2003).

STATEMENT

Respondents Joseph and Brenda Cochran operate a small commercial dairy farm in Tioga County, Pennsylvania. In contrast to many larger-scale commercial dairy farms, the Cochrans employ traditional methods of dairy farming, which means that they place as much emphasis on how their milk is produced as on how much of it they produce. The Cochrans thus allow their cows more time and room to graze and calve, and they do not use bovine growth hormone. The Cochrans believe that their methods result in healthier cows, a cleaner environment, and superior milk. Respondents' Appendix (hereinafter "Resp. App.") 14-15. Under the Dairy Promotion Stabilization Act of 1983, Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C. § 4501 *et seq.* (the "Dairy Promotion Act"), however, the Cochrans must pay roughly $3500 to $4000 per year to fund advertising and promotional programs that convey the message that all milk is the same. Resp. App. 14. The Cochrans

disagree with the message of the advertising they are required to finance under the Dairy Promotion Act, and they object to being required to support it. Resp. App. 1.

The Dairy Promotion Act is one in a long series of federal "checkoff" programs for agricultural commodities. Passed in 1983 at the behest of dairy producers,[1] the Act authorizes the Secretary of Agriculture to establish a program for "advertisement and promotion of the sale and consumption of dairy products" and for "research projects related thereto." 7 U.S.C. § 4504(a). The Act was passed to establish an "orderly procedure for developing, financing . . . and carrying out, a coordinated program of promotion" designed to strengthen and expand markets for dairy products. 7 U.S.C. § 4501(b). "Promotion" is defined as "paid advertising, sales promotion and publicity." *Id.* § 4504(a). Even the research funded under the Act must be directed toward the promotion of dairy products. *Id.* To administer the Dairy Program, the Act directs the Secretary to appoint a National Dairy Promotion and Research Board (the "Dairy Board") composed of private milk producers to develop and oversee promotional programs under the Act. *Id.* § 4505(b) & (c). Members of the Dairy Board are nominated by "eligible associations," which are associations of milk producers that engage in dairy promotion at the state and regional level. *See* 7 C.F.R. §§ 1150.133, 1150.273; Resp. App. 27-28. To finance promotional programs and the actions of

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[1] *See, e.g.*, S. Rep. No. 98-163 at 18, *reprinted in* 1983 U.S.C.C.A.N. 1658 (stating that the idea for the Act came from producer groups); http://www.dairycheckoff.com/history.htm ("With the help of a dairy producer referendum calling for national dairy promotion, Congress enacted The Dairy and Tobacco Adjustment Act.").

the Board in administering them, the Act provides for mandatory assessments to be paid by milk producers of 15 cents per hundredweight of milk sold. 7 U.S.C. § 4504(g).

The Secretary of Agriculture issued an order consistent with the Dairy Promotion Act in March 1984. *See* 49 Fed. Reg. 11806-1. Among other things, the order established the Dairy Board, 7 C.F.R. § 1150.131, prescribed its powers and duties, among which are to "receive and evaluate, or on its own initiative develop ... plans or projects to promote the use of fluid milk and dairy products," *id.* § 1150.139, and required all milk producers to pay assessments to support such promotional programs, *id.* § 1150.152.

The Dairy Board has primary responsibility for administering the dairy program and discharging the purposes of the Act. Petitioners' Appendix in No. 04-166 (hereinafter "Lovell Pet. App.") 113a-114a; Resp. App. 27. Its responsibilities include proposing, developing, and administering promotional and research programs under the Act, preparing budgets, reporting to the Secretary on the dairy program, and proposing changes to the Secretary's Order. *See* 7 U.S.C. § 4504(c); 7 C.F.R. §§ 1150.139, 1150.140. In 1994, the Dairy Board created Dairy Management, Inc. ("DMI"), a District of Columbia corporation, which now oversees and administers the promotional programs that are conducted under the Dairy Act. Resp. App. 28-29. DMI is a joint undertaking of the Dairy Board and the United Dairy Industry Association, which is an association of state and regional dairy promotional programs. Resp. App. 28-29, 100.

All advertising and promotional programs created by DMI and financed by compelled subsidies under the Dairy Promotion Act promote milk as a generic product. *See* 7 C.F.R. § 1150.114; Resp. App. 39-42; Lovell Pet. App. 44a. The advertisements convey the message that all milk is essentially the same regardless of who produces it and how it is produced. Resp. App. 14-15. Advertising under the Act is attributed to dairy producers like the Cochrans, whether they agree with the advertising or not. Resp. App. 14, 118. Perhaps the best known promotional program financed under the Dairy Promotion Act is the "got milk?" advertising campaign, which began running nationally in 1995 and still runs today. Resp. App. 46-48. The Dairy Promotion Act is also responsible for the "Ahh, the power of cheese" advertising campaign. Resp. App. 32.

The dairy program was established as an industry self-help program and has always been understood to be a private, non-governmental promotional program. Resp. App. 22-23. The Dairy Board and the board of DMI are composed entirely of private milk producers and other private parties, and the program is funded entirely by private milk producers. Lovell Pet. App. 113a-114a; Resp. App. 118-121, 22-23. Even the Secretary's oversight functions for the dairy program are funded by the compelled subsidies under the Act – that is, by private milk producers – rather than by general tax revenues. 7 U.S.C. § 4504(g)(2); 7 C.F.R. § 1150.151(b); Lovell Pet. App. 21a; Resp. App. 22-23. The Dairy Board and DMI decide what promotional programs to fund and they administer those programs. 7 U.S.C. § 4504(c), (d), (f); Lovell Pet. App. 113a-114a (AMS guidelines stating that "funding for such programs is industry specific . . . and the programs directed by industry boards"). Indeed, a majority of milk

producers may vote to terminate the entire program for any reason under the Dairy Promotion Act's referendum provisions. *See* 7 U.S.C. §§ 4506(a), 4507(b); Resp. App. 118-121 (dairy checkoff website stating that "[d]airy producers . . . ultimately determine if the checkoff program is meeting expectations"). Even the Secretary does not possess that power under the Act. *See* 7 U.S.C. § 4507(a) (allowing the Secretary to terminate an order issued under the Act only when she determines that it "obstructs or does not tend to effectuate the declared policy of" the Act). *Cf.* § 4507(b).

While the Secretary does have oversight responsibilities under the Dairy Promotion Act, they amount in essence to ensuring that the program complies with the Act. As the guidelines promulgated by the Agricultural Marketing Service, the entity that conducts the Secretary's oversight functions, make clear, "[i]t is the policy of AMS in carrying out the oversight responsibility to ensure that legislative, regulatory, and Department policy requirements are met. It is not the intent to impose constraints on board operations beyond these requirements." Lovell Pet. App. 114a. These functions include approving budgets and contracts, providing guidance on allocation of funds, reviewing financial statements, and approving advertising programs. *Id.* 114a-123a; Resp. App. 60-64. AMS will disapprove only advertisements "which it considers to be disparaging to another commodity or in violation of the prohibition against false and misleading advertising" contained in the Act. Lovell Pet. App. 118a.

The Cochrans filed suit in the Middle District of Pennsylvania on April 2, 2002, contending that the Dairy Promotion Act violates their First Amendment rights to free speech and association by requiring them to fund a

program of speech with which they disagree. On March 24, 2003, the district court concluded on cross motions for summary judgment that the Dairy Promotion Act was a valid economic regulation that did not violate the Cochran's rights to free speech and association. Gov. Pet. App. 48a-49a, 53a. The Cochrans timely appealed to the Third Circuit, which reversed the district court's decision on February 24, 2004.

The Third Circuit first held that the Dairy Promotion Act required dairy farmers to fund a program of private, rather than government, speech and was therefore not immune from scrutiny under the First Amendment. Gov. Pet. App. 19a-20a. Relying on the analysis of its earlier decision in *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), as well as the Eighth and Sixth Circuit decisions in *Michigan Pork Producers Ass'n, Inc. v. Veneman*, 348 F.3d 157 (6th Cir. 2003), *petitions for cert. filed*, 72 USLW 3059 (Jan. 20, 2004) (No. 03-1043) and 72 USLW 3539 (Feb. 19, 2004) (No. 03-1180), and *Livestock Marketing Ass'n v. U.S. Dep't of Agric.*, 335 F.3d 711 (8th Cir. 2003), *cert. granted*, 72 USLW 3725 and 3721 (May 24, 2004) (Nos. 03-1164 and 03-1165), the court concluded that the Secretary's supervisory responsibilities under the Dairy Act are not sufficient to transform an industry self-help program that the government itself describes as non-governmental into a program of government speech. *See* Gov. Pet. App. 19a.

Next, the Third Circuit addressed the question of whether the Dairy Promotion Act was unconstitutional under this Court's decision in *United States v. United Foods*, 533 U.S. 405 (2001), or whether dairy producers are sufficiently "bound together" in a compelled association for purposes other than speech to render the Act constitutional under *Glickman v. Wileman Bros. & Elliot, Inc.*, 521

U.S. 468 (1997). *See* Gov. Pet. App. 20a. Finding the Dairy Promotion Act nearly identical in structure and purpose to the mushroom act struck down in *United Foods*, the Third Circuit concluded that the Dairy Promotion Act was unconstitutional under the same rationale that this Court employed in *United Foods*. As a general rule, the First Amendment prevents government from compelling individuals to fund speech or an association whose sole purpose is speech. *Id.* 20a-21a. Only where individuals are otherwise compelled to associate for non-speech purposes may government compel them to fund speech that is germane to the purposes for which the association was brought together. *Id.* 21a. In short, according to the Third Circuit, *Glickman* applies "only in circumstances similar to *Abood* and *Keller* – in which individuals are 'bound together' in a collective enterprise such as a union or an integrated state bar, and the compelled subsidies are the 'logical concomitant of a valid scheme of economic regulation.'" *Id.* (citation omitted).

While the dairy industry is subject to a "patchwork of state and federal laws," as the Third Circuit put it, "there is no association that all milk producers must join that would make the entire industry analogous to a union, an integrated bar, or the collective enterprise at issue in *Glickman*." *Id.* 21a-22a. Instead, the Third Circuit found that the Dairy Promotion Act "is a free-standing promotional program that applies to all dairy producers regardless of whether they are subject to marketing orders or any other dairy regulations." *Id.* 22a. Because the sole purpose of the Dairy Promotion Act is speech and promotion, the Third Circuit concluded that it was unconstitutional under this Court's ruling in *United Foods*. *Id.* 23a.

Finally, the Third Circuit addressed whether the Dairy Promotion Act was constitutional under the *Central Hudson* test applicable to commercial speech regulations. Although one judge on the panel did not believe it was even necessary to determine that question, *id.* 32a-34a, the entire panel agreed that, in light of this Court's conclusion in *United Foods* that "the government may not compel individuals to support an advertising program for the sole purpose of increasing demand for that product," *id.* 29a, the Dairy Promotion Act was unconstitutional even under intermediate scrutiny applicable to commercial speech. *Id.* 29a, 34a.

REASONS FOR DENYING THE PETITION

In ruling that the Dairy Promotion Act is unconstitutional under the First Amendment, the Third Circuit joined every other federal circuit court that has decided a case involving an agricultural promotional act since this Court decided *United Foods*. The Third Circuit correctly concluded that the Dairy Promotion Act unconstitutionally compels dairy farmers like the Cochrans to fund advertising with which they disagree. That decision is not altered by the fact that there are other federal and state laws that regulate the dairy industry. Most industries in this country are subject to federal and state regulations. Under *United Foods*, however, compelled subsidies for speech are constitutional only where they are part of an otherwise constitutionally valid *compelled association* whose primary purpose is something other than speech. The Cochrans, and, indeed, all dairy farmers, are not compelled to associate with other dairy farmers under any federal law except the Dairy Promotion Act itself. The sole purpose of the

Dairy Promotion Act, like the mushroom act struck down in *United Foods*, is speech. The Act is therefore unconstitutional for precisely the same reasons this Court held the mushroom act unconstitutional in *United Foods*. The petitioners' implicit claim that the entire dairy industry is tantamount to a gigantic, nationwide union or other compelled association is flatly inconsistent with the facts of the industry and the federal regulations on which petitioners rely. The Dairy Promotion Act creates a stand-alone program that was established as an industry self-help measure like many other similar federal programs. It functions independently of any other law and cannot be said to be ancillary to any association in which dairy producers are compelled to participate.

Nor is there any split among the circuits on this question, as petitioners claim. The cases on which they rely were decided *before* this Court decided *United Foods* and two of those cases are unreported decisions that are not even precedent in their own circuits. The Third Circuit is the only federal circuit to address the constitutionality of the Dairy Promotion Act since this Court decided *United Foods*, and its decision is entirely consistent with that case and with this Court's other decisions on point. There is thus no reason for this Court to grant the petitions.

As for petitioners' arguments that the speech financed under the Dairy Promotion Act is "government speech" and immune from First Amendment scrutiny and that the Dairy Promotion Act is constitutional under *Central Hudson*, those issues are currently before the Court in *Veneman v. Livestock Marketing Ass'n.*, No. 03-1164, and *Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n.*, No. 03-1165, as petitioners admit. Respondents disagree with petitioners' arguments on these points and agree with

the position of the respondents in *Livestock Marketing*. *See* Brief of Livestock Marketing Ass'n. in Nos. 03-1164 and 03-1165. In any event, those issues will be resolved in the *Livestock Marketing* cases and there is no reason for this Court to grant the petitions in this case on those grounds. The petitions should therefore be denied.

I. THE THIRD CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISION IN *UNITED FOODS* IN CONCLUDING THAT THE DAIRY PROMOTION ACT UNCONSTITUTIONALLY REQUIRES DAIRY FARMERS TO FUND SPEECH WITH WHICH THEY DISAGREE.

In *United States v. United Foods*, 533 U.S. 405 (2001), this Court reaffirmed three fundamental First Amendment principles that control the outcome of this case. First, the right not to be compelled to subsidize speech is the rule under the First Amendment, and compelled subsidies for speech is the exception. As the Court stated in *United Foods*, the "general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Id.* at 411 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). Thus,

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors. . . . As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

Id. See also, *Wooley v. Maynard*, 430 U.S. 705 (1976) ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."); *Abood*

v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977) ("[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state.").

The second principle follows from the first: it is only in a narrow class of cases that government may compel individuals to subsidize speech with which they disagree. Only where individuals are already compelled to associate for an otherwise constitutional *non-speech* purpose may the mandatory dues or assessments they pay for that purpose be used to subsidize speech, and then only where the speech is germane to the purposes for which the compelled association was justified in the first place. *See United Foods*, 533 U.S. at 413-415. As this Court put it in *United Foods*, only where a "threshold inquiry" indicates that "there is some state imposed obligation which makes group membership less than voluntary" are compelled subsidies for speech permissible, "for it is only the overriding associational purpose which allows any compelled subsidy for speech in the first place." *Id.* at 413. Thus, unions may spend mandatory dues on speech germane to collective bargaining and state bar associations may spend mandatory dues on speech germane to the regulation of the legal profession. *Abood*, 431 U.S. at 235-36; *Keller v. State Bar of Cal.*, 496 U.S. 1, 13-14 (1990). But Congress may not pass a law compelling individuals to subsidize the speech of others simply because it wishes to increase demand for a particular product. *United Foods*, 533 U.S. at 413-14. Such a law would run afoul of the express language of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech."

Third, the government may not compel individuals to subsidize speech under a program whose principal object is speech itself. As the Court stated in *United Foods*, "[w]e have not upheld compelled subsidies for speech in the context of a program where the principal object is speech itself. . . . Were it sufficient to say speech is germane to itself, the limits observed in *Abood* and *Keller* would be empty of meaning and significance." *Id.* at 415.

Under these principles, the Third Circuit's conclusion follows as a matter of course. The Dairy Promotion Act compels dairy producers to subsidize the speech of others whether they agree with that speech or not. The Act establishes a stand-alone program that functions independently of any other federal or state dairy law or regulation, and it has no regulatory purpose beyond financing a program of speech. Indeed, the Act itself makes clear that "[n]othing in this subtitle may be construed to provide for the control of production or otherwise limit the right of individual milk producers to produce milk or the right of any person to import dairy products." 7 U.S.C. § 4501(b). While dairy farmers may join cooperatives without running afoul of the antitrust laws, *see* 7 U.S.C. § 291, there is no law or regulation that requires all dairy producers to associate or otherwise to act in concert with one another. Indeed, the Agricultural Fair Practices Act of 1967 ensures that dairy farmers may not be forced to join cooperatives. *See* 7 U.S.C. § 2301 *et seq.*; *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461 (1984). And while the dairy industry is subject to marketing orders under the Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, as amended, 7 U.S.C. § 601 *et seq.*, milk marketing orders operate on a regional basis and operate directly on milk

handlers – regulating the price they must pay for milk – rather than milk *producers* like the Cochrans. *See* 7 U.S.C. § 608c(5); 7 C.F.R. § 1000.1 *et seq.*[3] By contrast, the Dairy Promotion Act operates on a national basis, requiring every dairy producer in the country to pay subsidies for speech regardless of whether they sell milk that is subject to regional marketing orders. Indeed, the AMAA contains a provision that authorizes voluntary subsidies for advertising programs under milk marketing orders, 7 U.S.C. § 608c(5)(I), but Congress chose not to establish the dairy program under that provision.

In short, to contend, as petitioners do, that the compelled subsidies under the Dairy Promotion Act are "ancillary" to a broader collective enterprise with a purpose independent of speech is to strip those terms of all meaning and significance and to render this Court's decision in *United Foods* a nullity. In refusing to take that tack, the Third Circuit did nothing more exceptional than to faithfully interpret and apply this Court's decisions.

In claiming that this Court's decision in *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 468 (1997), commands a contrary result, petitioners misunderstand the holdings of both *Glickman* and *United Foods*. *See* Gov. Pet. Brf. at 11-14; Lovell Pet. Brf. at 13. As this Court made clear in *United Foods*, *Glickman* applies only where individuals are "bound together" in a collective enterprise, such as a union or an integrated state bar, and the compelled subsidies are the "logical concomitant of a valid

[3] The AMAA specifically exempts producers, such as dairy farmers, from the application of marketing orders. *See* 7 U.S.C. § 608c(13)(B) (stating that no marketing order "shall be applicable to any producer in his capacity as a producer"); Lovell Pet. App. 106a-108a.

scheme of economic regulation." *See United Foods*, 533 U.S. at 413-14. The compelled subsidies upheld in *Glickman* were part of the very same marketing orders that regulated many other aspects of the market for the California tree fruits at issue in the case. *See* 521 U.S. at 463. The objecting producer in the case was already compelled to associate for economic purposes under the marketing orders and was already compelled to pay assessments for that broader *non-speech* purpose. *See id.* at 469. The mandatory assessments in *Glickman* were thus analogous to union dues or bar fees assessed for broader regulatory purposes than simply speech. *See id.* at 469, 473; *United Foods*, 533 U.S. at 413-14. They were part of one collective enterprise that covered all producers in the market and were clearly ancillary to that enterprise. *See United Foods*, 533 U.S. at 411-12.

There is no milk industry regulation analogous to the two marketing orders at issue in *Glickman* and no compulsory association of dairy producers analogous to those governed by the marketing orders at issue in that case. The fallacy underlying the petitioners' argument is that the entire national dairy industry is analogous to the associations of tree fruit producers governed by two marketing orders in California. Petitioners in essence contend that the entire dairy industry is tantamount to one gigantic union. But nothing in this Court's precedents would support such a tortured comparison. The constitutionality of compelled subsidies for speech turns on whether they are ancillary to a *compelled association*, not whether they apply in an industry that Congress has regulated over time through a patchwork of statutes. If the gradual accretion of regulations over the course of nearly a century becomes the touchstone for compelled subsidies

for speech, the participants in nearly every national industry in the country could properly be compelled to finance the speech of others. That is not the law under the First Amendment or this Court's decisions interpreting and applying it.

II. THERE IS NO CIRCUIT SPLIT.

Petitioners incorrectly claim that there is a split between the Third Circuit and the Sixth and Ninth Circuits on the constitutionality of the Dairy Promotion Act. However, this claim is based on three cases – *Nature's Dairy v. Glickman*, No. 98-1073, 1999 WL 137631 (6th Cir. Mar. 2, 1999) (unpublished; table decision reported at 173 F.3d 429); *Gallo Cattle Co. v. California Milk Advisory Bd.*, 185 F.3d 969 (9th Cir. 1999); and *Gallo Cattle Co. v. U.S.D.A.*, No. 98-17318, 1999 WL 547427, (9th Cir. July 27, 1999) (unpublished; table decision reported at 189 F.3d 473) – that were decided before this Court issued its decision in *United Foods*, and two of the decisions are unpublished and thus not even precedent in their own circuits. Thus, there is no circuit split that would justify granting the petitions.

In *Nature's Dairy*, the Sixth Circuit upheld the Dairy Promotion Act over a First Amendment challenge on the grounds that federal regulation has "permeated the dairy industry" for years. 1999 WL 137631. Notably, the decision was issued *prior* to this Court's decision in *United Foods* and thus incorrectly relied on the overall amount of regulation in the industry in general, rather than on whether the Dairy Promotion Act was ancillary to an otherwise valid compelled association with a non-speech purpose. *See id.* The decision is scant on analysis and, as

an unpublished decision, is not even precedent in its own circuit. *See* Sixth Circuit Local Rule 28(g). This is presumably the reason the Sixth Circuit itself did not even mention the case in its subsequent *published* decision in *United Foods v. United States*, 197 F.3d 221 (6th Cir. 1999), the decision that this Court later affirmed in *United Foods*.

In *Gallo Cattle Co. v. California Milk Advisory Bd.* (*Gallo I*), the Ninth Circuit concluded that a California dairy promotional program authorized under a state statute similar to the Agricultural Marketing Agreement Act did not violate the First Amendment. 185 F.3d 969. The marketing orders in *Gallo I*, however, like those at issue in *Glickman*, both regulated the market for milk *and* authorized a promotional program. *See* 185 F.3d at 970-71. The statute was thus distinctly different from the Dairy Promotion Act, which pertains only to speech. *Gallo I* was also decided prior to *United Foods* and thus did not consider the importance of compelled association in its analysis, and it improperly relied on the fact that the compelled subsidies were germane only to advertising itself. *See* 185 F.3d at 974-75, 976-77. Indeed, as the Ninth Circuit itself later recognized, *Gallo I* is questionable precedent. *See Delano Farms Co. v. California Table Grape Comm'n*, 318 F.3d 895, 899 (9th Cir. 2003).

The private petitioners also rely on *Gallo Cattle Co. v. U.S.D.A.* (*Gallo II*) (Lovell Pet. at 15), in which the Ninth Circuit upheld the Dairy Promotion Act over a First Amendment challenge. 1999 WL 547427. This decision, too, preceded *United Foods*, and thus suffers from the same problems as *Gallo I* and *Nature's Dairy*. In addition, *Gallo II* is unpublished, and thus not precedent in the Ninth Circuit. *See* Ninth Circuit Local Rule 36-3.

The Third Circuit's decision is the only published decision of a federal circuit court to squarely address the constitutionality of the Dairy Promotion Act in light of this Court's relevant precedents. The Third Circuit's decision is entirely consistent with governing law and there is no reason for this Court to disturb it.

III. THERE IS NO OTHER REASON TO GRANT CERTIORARI.

The petitioners also contend that the Dairy Promotion Act creates a program of "government speech" which is immune from First Amendment scrutiny and that the Dairy Promotion Act is constitutional under this Court's decision in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). These arguments are wrong, as Respondents briefly demonstrate below. Indeed, the arguments amount to a request that this Court overrule its decision in *United Foods* on the grounds that the speech at issue was always that of the government, and the Court applied the wrong standard in that case. In any event, these arguments do not provide grounds on which to grant the petitions because the Court will fully address and resolve them this term in *Veneman v. Livestock Marketing Ass'n.*, No. 03-1164, and *Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n.*, No. 03-1165.

Petitioners' claim that the Dairy Promotion Act creates a program of "government speech" that is immune from First Amendment scrutiny is wrong in both its factual and legal premises. As a factual matter, the dairy program is a private industry self-help program, financed and directed by and for dairy farmers, not the government, that creates advertising and promotional programs made

in the name of dairy farmers, not the government. *See, e.g.*, Resp. App. 22-23, 118-121. Perhaps the best description of the program appears on its own website: "Checkoff programs are funded by dairy producers – NOT TAXPAYERS. They are not governmental programs; rather, they are businesses with governmental oversight." *Id.* 118-121. As this Court held in *Keller*, where a group's principal funding comes from dues imposed on its members, rather than from general tax revenues, its members are a select group of individuals, and its functions are specialized and designed to serve a narrow segment of the population, its speech is private, not government, speech. *See* 496 U.S. at 11-13. To claim, as petitioners do, that the dairy program is in reality a government program that finances government speech is not only to contradict all evidence to the contrary, it is to suggest duplicity on the part of the government and the Dairy Board, both of which have described the program to the public at every turn as anything *but* a government program. The petitioners' arguments are thus as disingenuous as they are wrong.

More fundamentally, as a legal and constitutional matter, this argument is based on a faulty premise: that attaching the label "government" to speech obviates the necessity of applying First Amendment scrutiny. While it is true that government may speak without having to answer to every taxpayer who disagrees with what it says, that is a far cry from petitioners' argument – that government may compel individuals to subsidize speech made in their own names so long as it controls the content of that speech. This Court has held in an unbroken line of cases that government may not compel individuals to speak in their own right, *Wooley v. Maynard*, 430 U.S. 705, 714 (1976); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S.

624 (1943), to subsidize speech with which they disagree, *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 234-35 (1977); *Keller*, 496 U.S. at 11-13, *United Foods*, 533 U.S. at 413-415, or to associate with those with whom they disagree, *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-American Gay Group of Boston*, 515 U.S. 557, 573 (1995). Petitioners seek nothing less than to uproot this long-standing precedent and to replace it with the perverse principle that the *greater* the government compulsion to speak or to subsidize speech and the *greater* the control it exerts over the message, the *less* First Amendment scrutiny that applies. This argument ignores the key distinction between cases in which government appropriately speaks in its own right and those in which it unconstitutionally compels individuals to speak: the source of funding and the attribution of the message. Where, as here, government compels individuals directly to fund a program of speech that is attributed to those individuals, it is not speaking in its own right, and its actions are subject to First Amendment scrutiny. *See Keller*, 496 U.S. at 11-13.

In short, as the Third Circuit recognized – along with every other federal circuit court that has addressed this issue in similar contexts – acts such as the Dairy Promotion Act compel individuals to finance *private*, not government, speech and are subject to exacting First Amendment scrutiny as a result. *See* Gov. Pet. App. 18a-20a.

Nor is the Dairy Promotion Act constitutional under the *Central Hudson* test. This Court rejected the same argument in *United Foods*, holding that even under intermediate scrutiny applicable to commercial speech, the mere desire to advertise agricultural products is not sufficient to justify compelling producers to subsidize

speech with which they disagree. *See* 533 U.S. at 415. The same rationale applies here. Like the mushroom act, the sole purpose of the Dairy Promotion Act is speech. And any legitimate interests the government may have in advertising such products can be accomplished by funding the programs through general tax revenues, rather than targeted assessments on producers, and attributing the advertising to the government, rather than private parties.

CONCLUSION

For the forgoing reasons, the petitions for writs of certiorari in case nos. 04-166 and 04-446 should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Joseph S. Cochran and Brenda S. Cochran RR#4 Box 140 Westfield PA 16950 – PLAINTIFFS, VS. Ann Veneman, As Secretary, United States Department of Agriculture and National Dairy Promotion Board, – DEFENDANTS.	)	No. 4:CV-02-00529

COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF
FRCP 57 and 28 U.S.C. §§ 2201 and 2202

(Filed Apr. 02, 2002)

SUMMARY OF ACTION

Joseph S. Cochran and Brenda S. Cochran (Cochrans), dairy producers located in Pennsylvania, who are not part of any collective body, in order to secure their right to speak or not speak as they, alone, choose, in the promotion of their milk products and not desiring to promote milk products manufactured by competitors of their customer, seek a declaratory judgment determining that Dairy Promotion Program, Title I, Subtitle B of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128, 7 U.S.C. § 4504(g) (Act) is an unconstitutional restriction on their right to free speech, because the Act

and the corresponding regulations require the Cochrans to monetarily support a program known as the Dairy Promotion Program and to join, against their will, in expressive association with other dairy producers solely for the purpose of funding speech even though they do not approve of that speech. The Act, which authorizes the Dairy Promotion Program and the creation of the National Dairy Promotion and Research Board, requires all dairy producers, including the Cochrans, to pay fifteen cents per hundredweight (cwt) on all their milk production for the purpose of compelled speech. Because it is so funded, all dairy farmers, including the Cochrans, are compelled to speak through compelled support of generic advertising in violation of the First Amendment to the U.S. Constitution. The United States Supreme Court has held that a similar promotion program for mushroom producers violates the First Amendment. *U.S. v. United Foods, Inc.*, 533 U.S. 405 (2001). A case and controversy exists between the plaintiff-producers and the defendants as to whether or not the compulsory dairy promotion program violates the First Amendment. As a remedy, the Cochrans seek injunctive relief, preliminary and final, that prohibits the Secretary from enforcing the compelled contribution portion of the Act.

PARTIES

Plaintiffs

1. The Cochrans are engaged in the production of milk for commercial use on a dairy farm located in Pennsylvania and, pursuant to the Act, are compelled to support the Dairy Promotion Program through the mandatory checkoff from their milk checks and through the attribution of the resulting speech to them as dairy producers.

Defendants

2. Ann Veneman is the Secretary of the United States Department of Agriculture and is authorized by law to administer the Act including the collection of assessments against milk production.

3. The National Dairy Promotion Board oversees the program and directs the expenditures.

JURISDICTION AND VENUE

4. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337(a) because this claim arises under the Constitution of the United States, First Amendment and laws of the United States (to wit: Title I, Subtitle B of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128) and pursuant to 28 U.S.C. § 1346 because an officer and agency of the United States are proper party defendants.

5. This Court has the authority to issue a declaratory judgment by virtue of 28 U.S.C. §§ 2201 and 2202 and FRCP 57.

6. This Claim has been brought in the proper forum because all the plaintiffs are residents of Tioga County, Pennsylvania, and the defendant is an officer or agency of the United States. 28 U.S.C. § 1402 and 28 U.S.C. § 118(b)(1).

BACKGROUND

7. The Cochrans market the milk of their family farm independently.

8. The plaintiffs are currently forced to pay approximately $3500 to $4000 to the Dairy Promotion Program.

9. In 1983 Congress passed P.L. 98-180 known as the "Dairy Production Stabilization Act of 1983". 7 U.S.C. §§ 4501-4509.

10. The provision which gives rise to the instant lawsuit is found at 7 U.S.C. § 4504(g) which reads as follows:

> (g) The order shall provide that each person making payment to a producer for milk produced in the United States and purchased from the producer shall, in the manner as prescribed by the order, collect an assessment based upon the number of hundredweights of milk for commercial use handled for the account of the producer and remit the assessment to the Board. The assessment shall be used for payment of the expenses in administering the order, with provision for a reasonable reserve, and shall include those administrative costs incurred by the Department after an order has been promulgated under this subchapter. The rate of assessment prescribed by the order shall be 15 cents per hundredweight of milk for commercial use or the equivalent thereof. A milk producer or the producer's cooperative who can establish that the producer is participating in active, ongoing qualified State or regional dairy product promotion or nutrition education programs intended to increase consumption of milk and dairy products generally shall receive credit in determining the assessment due from such producer for contributions to such programs of up to 10 cents per hundredweight of milk marketed or, for the period ending

six months after November 29, 1983, up to the aggregate rate in effect on November 29, 1983 of such contributions to such programs (but not to exceed 15 cents per hundredweight of milk marketed) if such aggregate rate exceeds 10 cents per hundredweight of milk marketed. Any person marketing milk of that person's own production directly to consumers shall remit the assessment directly to the Board in the manner prescribed by the order.

11. The sole purpose of the Act is to compel all dairy farmers including Cochrans to fund speech in which they either disagree or wish to remain silent. Though some funds are for research, the research is for the purpose of supporting the compelled speech.

12. The Dairy Promotion Act replaced the voluntary promotion programs that existed in many states and under the provisions of various federal milk marketing orders under the Agricultural Marketing Agreement Act. 7 U.S.C. § 608c.

13. The Act requires that any handler paying the Cochrans for their milk must reduce the amount of that payment by fifteen cents (15 cents) per cwt for Cochrans' contribution to the Dairy Promotion Program.

14. Producers who do not pay the assessment are subject to fines and penalties including a restraining order, a civil fine up to $1000 for each violation and, if willful, a penalty equal to 100 percent of the assessment levied. 7 U.S.C. § 4510. The power of the federal courts can be used to enforce compliance. *Id.* and 7 U.S.C. § 4511.

15. In 1983 the Secretary of Agriculture promulgated regulations for the administration of the Dairy

Promotion Program. These regulations are found at 7 C.F.R. Part 1150.

16. Pursuant to the Act, the Secretary issued regulations requiring all producers to contribute to the promotion. 7 C.F.R. § 1150.152(a) reads as follows:

> (A) Each person making payment to a producer for milk produced in the United States and marketed for commercial use shall collect an assessment on all such milk handled for the account of the producer at the rate of 15 cents per hundredweight of milk for commercial use or the equivalent thereof and shall remit the assessment to the Board.

17. The National Dairy Promotion Board oversees the use of the funds.

18. The Board is permitted by law to recommend amendments, which would include the continuance of the promotion order.

19. Though generally prohibited from engaging in political advocacy, the Board can, and does, directly and indirectly, spend funds collected in part from the Cochrans to "promote the promotion" among other dairy farmers. It does not spend any money or provide any resources for the support of those opposed to the promotion.

20. The 15 cent cwt assessment represents a significant portion of the gross profit margin of the Cochran's dairy operation. In some years the total assessment prevents the Cochrans from implementing essential farm management practices. Failure to implement these practices impairs Cochrans' ability to remain competitive in the ever-changing dairy industry.

21. The Cochrans operate a dairy farm using traditional farming methods. They contend that their use of sustainable agriculture in the form of less intensive herd management and grazing system makes for a superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and our planet.

22. The generic advertising for milk and milk products, for which they are required to pay, denies the existence of the value of such alternative sources of milk by its implication that milk is a generic product and, thus, runs counter to the Cochran's own speech and views regarding the production and marketing of milk.

23. There is no identifiable principle that can distinguish out of hand that a debatable issue exists as to the total value of such marketing and production policies.

24. Aside from being compelled to support the promotion of milk products, the Cochrans have full marketing autonomy and, in fact, they annually and individually negotiate with processing plants for the purchase of the milk produced on their farm.

25. They market their milk outside of any cooperative marketing program that benefits from exemption from the antitrust laws.

26. There are no marketing regulations regarding the amount of production that Cochrans can produce or how they can sell their milk except for sanitary regulations.

27. All of the milk producers who participate like Cochrans in the Dairy Promotion Program are not otherwise so universally joined in any other collective activity.

28. The Dairy Promotion Program is a separate, stand alone, program that is not integrated into or made a part of other programs that involve dairy specifically and agriculture generally. It does not arise out of any collective activity of dairy producers.

29. Quality and grading of milk is done through separate state-local inspection programs administered by the state and local governments. They are not established by any collective activity of the producers.

30. Dairy producers may be further subject to other regulations, but none arise out of any collective activity in which the Cochrans participate voluntarily or involuntarily. Each operate under difference statutes different regulations, different administrative boards or commissions, and each have different purposes and scopes.

31. As milk producers, the Cochrans can not only decide whether to dairy, they can choose to produce grade B milk (for manufacturing purposes only) or grade a milk (for fluid as well as manufacturing purposes, and choose whether to individually market their milk or join in some way with the farmers to collectively market their milk.

32. The Cochrans cannot, however, choose whether or not to promote products manufactured by others and fund nutrition propaganda that counters, weakens, or does not further their own opinions as to the different nutritional values in their milk as contrasted with the milk generically promoted.

CAUSE OF ACTION

33. Compelled payment of money for the purpose of speech violates the First Amendment to the U.S. Constitution, which reads

> Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

34. The Dairy Promotion Program clearly violates the First Amendment because:

a. It compels the Cochrans to support speech with which they do not agree or which they do not wish to make.

b. It raises a direct and immediate infringement on the Cochrans' First Amendment rights because the assessment subsidizes speech that promotes the sale of dairy products that compete with the dairy products that the Cochrans' milk is used to manufacture.

c. The compulsory financial participation in the speech and the attribution of that speech to all dairy producers implies that Cochrans agree with the advertisements when in fact plaintiffs may not so agree.

d. It forces plaintiffs to expressly associate with other producers against their will for the sole purpose of sponsoring in speech and nothing else.

RELIEF SOUGHT

WHEREFORE, the Plaintiffs hereby demand relief as follows:

1483.02

A. That the Dairy Promotion Program, Title I, Subtitle B of the Dairy and Tobacco Adjustment Act of 1983, Pub. L. 98-180, 97 Stat. 1128 (Act), 7 U.S.C. § 4504(g), be declared unconstitutional; and

B. That the defendant Secretary and her agents and those acting in concert therewith be enjoined, temporarily, preliminarily, and permanently from assessing plaintiffs for the Dairy Promotion Program and using funds collected from plaintiffs; and

C. That the defendant Secretary and Dairy Promotion Board and their agents and those acting in concert therewith be enjoined, temporarily, preliminarily, and permanently from compelling assessments in accordance with 7 C.F.R. § 1150.152 and using such funds without the consent of those assessed; and

D. That the defendant Secretary be directed to recoup and then refund any assessments collected by the Dairy Promotion Program from plaintiffs collected during the pendency of this case; and

E. Enjoin the defendants from using funds collected under the Dairy Promotion Program in defense of this claim; and

F. Award the plaintiffs attorneys fees and costs; and

G. Provide such other relief that is appropriate in the premises.

Respectfully Submitted

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Joseph S. Cochran and Brenda S. Cochran –PLAINTIFFS, VS. Ann Veneman, As Secretary, United States Department of Agriculture And National Dairy Promotion Board, –DEFENDANTS.	)	Judge James F. McClure, Jr. No. ~~3:00CV-02-0529~~ 4:02-CV-529

EXHIBITS IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

(Filed Jun. 6, 2002)

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June 5, 2002

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Joseph S. Cochran and Brenda S. Cochran **-PLAINTIFFS,** VS. Ann Veneman, As Secretary, United States Department of Agriculture and National Dairy Promotion Board, **-DEFENDANTS.**	JUDGE McCLURE No. 3:00CV-02-0529

DECLARATION OF JOSEPH S. COCHRAN IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Joseph S. Cochran, being of lawful age, declares under penalty of perjury pursuant to 28 U.S.C. 1746:

1. The following testimony is given on my personal knowledge and belief and for purposes of supporting a motion for summary judgment in the case that is styled and numbered above.

2. I and my wife, Brenda Cochran, with our family, operate a dairy farm in Tioga County, Pennsylvania. Its address is RR#4 Box 140, Westfield, PA 16950.

3. At this farm we produce milk for commercial use.

4. We are forced to subsidize the Dairy Promotion Program through the mandatory checkoff from our milk checks.

5. Some of the advertisements say something to the effect "Brought to you by your local dairy farmer" or other similar statement that tends to attribute the message to me.

6. I have never had the opportunity to create, edit, approve or disapprove any advertisement or promotion that has been funded by the dairy checkoff.

7. We market the milk of our family farm independently.

8. We are currently forced to subsidize the Dairy Promotion Promotion Program of approximately $3500 to $4000 per year.

9. The 15 cent cwt assessment represents a significant portion of the gross profit margin of our dairy operation. In some years, the total assessment prevents us

from implementing essential farm management practices. Failure to implement these practices impairs our ability to remain competitive in the ever changing dairy industry.

10. We operate our dairy farm using traditional farming methods. It is our belief that the use of sustainable agriculture in the form of less intensive herd management and grazing system makes for a superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and our planet.

11. Based upon our observation of dairy farming today, our methods differ from those used on most of the other commercial dairies.

12. Over the years, we have spoken out on this issue at a number of different formal and informal meetings.

13. The promotion of milk generically is speech that denies there is any difference in milk and thus the promotion program acts to counter our own beliefs and commitments to a way of farming.

14. We have full marketing autonomy. Annually we individually negotiate with various processing plants for the sale of our milk that we have produced on our farm.

15. We do not participate in any cooperative marketing program that benefits from exemption from the antitrust laws.

16. We are not subject to any marketing regulations that tell us how much or how little milk we can produce nor how we can market our milk.

17. We are subject to sanitary regulations but these have no bearing on the marketing or pricing of our milk. Quality and grading of milk is done through separate

state-local inspection programs administered by the state and local governments. These regulations do not arise out of any collective activity of the producers.

18. We are not joined with any of the other dairy producers that also subsidize the dairy promotion program in any way.

19. We retain the right to decide whether to dairy, whether to produce grade B milk (for manufacturing purposes only) or grade A milk (for fluid as well as manufacturing purposes), and whether to individually market our milk or join in some way with other farmers to collectively market our milk.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on June 4, 2002

/s/ Joseph S. Cochran
Joseph S. Cochran

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

Joseph S. Cochran and	) JUDGE
Brenda S. Cochran	) JAMES F. McCLURE, JR.
– PLAINTIFF,	) No. 3:00CV-02-0529
VS.	)
	)
Ann Veneman, As Secretary,	)
United States Department	)
of Agriculture	)
and	)
National Dairy Promotion Board,	)
– DEFENDANTS.	)

PLAINTIFFS' STATEMENT OF FACTS NOT IN MATERIAL DISPUTE IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Pursuant to the local rules, the Plaintiffs submit the following facts that are not in material dispute in support of their motion for summary judgment filed contemporaneously herewith.

1. Joseph S and Brenda Cochran, with their family, operate a dairy farm in Tioga County, Pennsylvania. Its address is RR#4 Box 140, Westfield, PA 16950. (Cochran Aff. ¶2).

2. Ann Veneman is the Secretary of the United States Department of Agriculture and is authorized by law to administer the Act including the collection of assessments against milk production.

3. The National Dairy Promotion Board oversees the program and directs the expenditures.

4. At that farm the Cochrans produce milk for commercial use. (Cochran Aff. ¶3)

5. They are forced to subsidize the Dairy Promotion Program through the mandatory checkoff from our milk checks. (Cochran Aff. ¶4)

6. Some of the advertisements funded by that program say something to the effect "Brought to you by your local dairy farmer" or other similar statement that tends to attribute the message to them. (Cochran Aff. ¶5)

7. Neither of the Cochrans have ever had the opportunity to create, edit, approve or disapprove any advertisement or promotion that has been funded by the dairy checkoff. (Cochran Aff. ¶6)

8. They market the milk of their family farm independently. (Cochran Aff. ¶7)

9. They are currently forced to subsidize the Dairy Promotion Program at approximately $3500 to $4000 per year. (Cochran Aff. ¶8)

10. The 15 cent cwt assessment represents a significant portion of the gross profit margin of their dairy operation. In some years, the total assessment prevents them from implementing essential farm management practices. Failure to implement these practices impairs their ability to remain competitive in the ever changing dairy industry. (Cochran Aff. ¶9)

11. They operate their dairy farm using traditional farming methods. It is their belief that the use of sustainable agriculture in the form of less intensive herd management and grazing system makes for a superior milk, promotes a better use of the resources, promotes the environment, and, in sum, provides a healthier product for humans and their planet. (Cochran Aff. ¶10)

12. Based upon their observation of dairy farming today, their methods differ from those used on most of he other commercial dairies. (Cochran Aff. ¶11)

13. Over the year, they have spoken out on this issue at a number of different formal and informal meetings. (Cochran Aff. ¶12)

14. The promotion of milk generically is speech that denies there is any difference in milk and thus the promotion program acts to counter their own beliefs and commitments to a way of farming. (Cochran Aff. ¶13)

15. They have full marketing autonomy. Annually they individually negotiate with various processing plants

for the sale of their milk that they have produced on their farm. (Cochran Aff. ¶14)

16. They do not now participate in any cooperative marketing program that benefits from exemption from the antitrust laws. (Cochran Aff. ¶15)

17. They are not subject to any marketing regulations that tell them how much or how little milk they can produce nor how they can market their milk. (Cochran Aff. ¶16)

18. They are subject to sanitary regulations but these have no bearing on the marketing or pricing of their milk. Quality and grading of milk is done through separate state-local inspection programs administered by the state and local governments. These regulations do not arise out of any collective activity of the producers. (Cochran Aff. ¶17)

19. They are not joined with any of the other dairy producers that also subsidize the dairy promotion program in any way. (Cochran Aff. ¶18)

20. They retain the right to decide whether to dairy, whether to produce grade B milk (for manufacturing purposes only) or grade A milk (for fluid as well as manufacturing purposes), and whether to individually market their milk or join in some way with other farmers to collectively market their milk. (Cochran Aff. ¶19)

21. The Dairy Promotion Program is a separate, stand alone, program which is not integrated into or made a part of other programs that involve dairy specifically and agriculture generally. It does not arise out of any collective activity of dairy producers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 5th day of June, 2002, a copy of the foregoing was served by first class mail, postage prepaid on the following:

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USDA
REPORT TO CONGRESS
ON THE
DAIRY PROMOTION PROGRAMS
2001

INTRODUCTION

The enabling legislation of both the producer and processor dairy promotion programs (7 U.S.C. 4514 and 7 U.S.C. 6407) requires the U.S. Department of Agriculture (USDA) to submit an annual report to the House Committee on Agriculture and the Senate Committee on Agriculture, Nutrition, and Forestry by July 1. The producer and processor programs are conducted under the Dairy Promotion and Research Order (Dairy Order) (7 CFR 1150) and the Fluid Milk Promotion Order (Fluid Milk Order) (7 CFR 1160), respectively. This report includes a description of activities for both the producer and processor programs and summarizes activities of their national integrated fluid milk program. An accounting of funds collected and spent, a fluid milk market analysis, and an independent analysis of the effectiveness of the advertising campaigns of the two programs also are included. This report addresses program activities for the fiscal period January 1 - December 31, 2000, of the dairy Promotion Program and the Fluid Milk Processor Promotion Program, unless otherwise noted.

PRODUCER DAIRY PROMOTION PROGRAM

The Dairy Production Stabilization Act of 1983 (Dairy Act) (7 U.S.C. 4501 *et seq.*) authorized a national producer program for dairy product promotion, research, and nutrition education as part of a comprehensive strategy to increase human consumption of milk and dairy products. Dairy farmers fund

this self-help program through a mandatory 15-cent per hundredweight assessment on all milk produced in the contiguous 48 States and marketed commercially. Dairy farmers administer the national program through the National Dairy Promotion and Research Board (Dairy Board). The Dairy Act provides that dairy farmers can direct up to 10 cents per hundredweight of the assessment for contributions to qualified State or regional dairy product promotion, research, or nutrition education programs (Qualified Programs).

The Dairy Order became effective on May 1, 1984. The Dairy Act required the Secretary of Agriculture to conduct a referendum among dairy farmers by September 30, 1985, to determine if a majority favored continuation of the program. Nearly 90 percent of the dairy farmers voting in the August-September 1985 referendum favored continuing the program. USDA held a second referendum on the dairy promotion program in August 1993. Approximately 71 percent of the dairy farmers who voted in the referendum favored continuing the program. USDA will hold future referenda at the direction of the Secretary or upon the request of at least 10 percent of the affected dairy farmers.

The Dairy Board portion of the revenue from the 15-cent per hundredweight producer assessment was $84.7 million for 2000. Qualified Programs revenue from the producer assessment was $169 million for 2000. Of the total monies collected by the Qualified Programs, 68 percent was used for advertising and promotion, and 21 percent was used for nutrition education and public and industry communications. The remaining funds were used for market, nutrition, and product research, as well as for export enhancement and general and administrative expenses. Revenue from assessments for the Dairy Board and many of

the Qualified Programs is integrated through a joint process of planning and program implementation so that the programs on the national, regional, State, and local level work together.

FLUID MILK PROCESSOR PROMOTION PROGRAM

The Fluid Milk Promotion Act of 1990 (Fluid Milk Act) (7 U.S.C. 6401 *et seq.*) authorized the establishment of a national processor program for fluid milk promotion and education. The Fluid Milk Order became effective December 10, 1993. The Secretary appointed the initial National Fluid Milk Processor Promotion Board (Fluid Milk Board) on June 6, 1994. The fluid Milk Order has an expiration date of December 31, 2002.

Processors administer this program through the Fluid Milk Board. Processors marketing more than 500,000 pounds of fluid milk per month fund this program through a 20-cent per hundredweight assessment on fluid milk processed and marketed in consumer-type packages in the contiguous 48 States and the District of Columbia.

The Fluid Milk Board's revenue for the January 1 through December 31, 2000, period was $109 million. Approximately 64 percent of program expenditures was used for fluid milk advertising, 14 percent for promotions, and about 10 percent for public relations. The remaining funds were used for research and general and administrative expenses.

The Fluid Milk Act required the Secretary to conduct a referendum among fluid milk processors to determine if a majority favored implementing the program. In the October 1993 referendum, 72 percent of the processors voted to approve the implementation of the fluid milk program. These processors represented 77

percent of the volume of fluid milk products marketed by all processors during May 1993, the representative period set for the referendum. USDA held a continuation referendum in February-March 1996. Of the processors voting in that referendum, nearly 65 percent favored continuation of the program. These processors represented 71 percent of the volume of fluid milk products marketed by all processors during September 1995, the representative period set for the referendum. In November 1998, USDA held a continuation referendum at the request of the Fluid Milk Board. Fluid milk processors voted to continue a national program for fluid milk promotion established by the Fluid Milk Order. Of the processors voting in this referendum 54 percent favored continuation of the order. These processors represented 86 percent of fluid milk products processed and marketed by fluid milk processors voting in the referendum. The Fluid Milk Act and Order state that USDA will hold future referenda upon the request of the Fluid Milk Board, processors representing 10 percent or more of the volume of fluid milk products marketed by those processors voting in the last referendum, or when called by the Secretary.

NATIONAL INTEGRATED FLUID MILK PROGRAM

Dairy Management Inc. (DMI), the staffing organization for the Dairy Board, and the Fluid Milk Board completed the integration of their fluid milk programs in January 1999, and this continued in 2000. The integration plan has enabled the Fluid Milk Board to fulfill the promotion program coordination requirements of the Fluid Milk Act. The funding level of the integrated program totaled approximately $180 million in 2000, with about $86.5 million from DMI and State and regional organizations and about

$94.1 million from the Fluid Milk Board. The integrated plan, which includes both planning and implementation, continues to be research-based, message-focused, and jointly managed.

A summary of the national integrated fluid milk program for fiscal year 2000 follows the Fluid Milk Board section in Chapter 1 of this report.

USDA OVERSIGHT AND INDEPENDENT ANALYSIS

USDA has oversight responsibility for both dairy promotion programs. The oversight objectives ensure that the Boards and the Qualified Programs properly account for all program funds and that they administer the programs in accordance with their respective Acts and Orders. USDA also has responsibility for an independent evaluation of the programs. The Boards reimburse the Secretary, as required by the Acts, for USDA's administrative costs of program oversight and for the independent analysis.

Chapter 1 of this Report describes the activities of the Dairy Board, Qualified Programs, and the Fluid Milk Board. Chapter 2 reviews the oversight activities of USDA. Chapter 3 reports the results of the independent analysis of the effectiveness of the programs conducted by Cornell University. Chapter 4 includes an updated review of the beverage marketing environment by the Beverage Marketing Corporation of New York.

CHAPTER 1

THE DAIRY PROMOTION PROGRAMS

In 2000, the National Dairy Promotion and Research Board (Dairy Board) and the National Fluid Milk Processor Promotion Board (Fluid Milk Board) developed and implemented programs to expand the human consumption of fluid milk and dairy products. While each promotion program has many unique activities, the two programs integrated their fluid milk programs beginning in 1999 and continued the integrated program in 2000.

National Dairy Promotion and Research Board

The mission of the Dairy Board is to coordinate a promotion and research program that expands domestic and foreign markets for fluid milk and dairy products produced in the United States. The Dairy Board is responsible for administering the Dairy Promotion and Research Order (Dairy Order), developing plans and programs, and approving budgets. Its dairy farmer board of directors administers these plans and monitors the results of the programs.

The Secretary of Agriculture (Secretary) appoints 36 dairy farmers to administer the Dairy Order. The Secretary makes the appointments from nominations submitted by producer organizations, general farm organizations, qualified State or regional dairy product promotion, research, or nutrition education programs (Qualified Programs), and by other means as determined by the Secretary (7 CFR 1150.133(a)). Dairy Board members serve 3-year terms and represent one of 13 regions in the contiguous 48 States. Dairy Board members elect four officers: Chair, Vice-Chair, Treasurer, and Secretary.

Current Dairy Board members are in **Appendix A-1**. A map of the Dairy Board's regions is in **Appendix B-1**.

Total Dairy Board actual revenue for 2000 was $85.3 million (includes assessments and interest). This amount was higher than the Dairy Board budget of $82.6 million for that period. The Dairy Board revised budget for 2001 projects total revenue of $84.7 million from assessments and interest. The Dairy Board administrative budget continued to be within the 5-percent-of-revenue limitation required by the Dairy Order. The actual income and expenses for 1998-2000 are in **Appendix C-1**. USDA's oversight and evaluation expenses for 1996-2000 are in **Appendix C-2**. **Appendix C-3** displays the Dairy Board's approved budgets and a comparison of program funding by function for 1999-2001. An independent auditor's report for 2000 is in **Appendix D-1**.

The Dairy Board has two standing committees, the Finance and Administration (F&A) Committee and the Executive Committee. The F&A Committee is made up of the Dairy Board officers and appointments by the Dairy Board Chair. The Dairy Board Treasurer is the Chair of the F&A Committee, and the committee elects a Vice-Chair. The full Dairy Board serves as the Executive Committee. The remaining committees for the Dairy Board are joint program committees and are described as follows:

In March 1994, the Dairy Board approved the creation of Dairy Management Inc.™ (DMI). DMI is a joint undertaking between the Dairy Board and the United Dairy Industry Association (UDIA). UDIA is a federation of 18 of the 62 active Qualified Programs under the direction of a board of directors. DMI merged the staffs of the Dairy

Board and UDIA to manage the Dairy Board programs as well as the American Dairy Association® and National Dairy Council® throughout the contiguous 48 States. DMI is a merger of the two separate program and administrative staffs into a single staff that serves both boards, and is structured into support groups. The domestic marketing group supports advertising, school marketing, nutrition and product research, product publicity, and promotion activities. The industry relations/communications group provides outlets for news about dairy through its media contacts as well as communication regarding the dairy checkoff program to producers and the rest of the dairy industry. The research, planning, and evaluation group provides analysis of domestic and foreign marketplaces, program effectiveness, consumption patterns, and consumer perceptions for effective program planning, implementation, and measurement. The export group serves as a resource for U.S. dairy exporters to improve export capabilities of U.S. dairy companies.

Since January 1, 1995, the Dairy Board and UDIA have developed their marketing plans and programs through DMI. DMI facilitates the integration of producer promotion funds through a joint process of planning and program implementation so that the programs on the national, regional, State, and local level work together. The goals of DMI are to reduce administrative costs, to have a larger impact on the consumer, and to be better able to drive demand and help increase human consumption of fluid milk and dairy products.

DMI funds 1- to 3-year research projects that support marketing efforts. Six Dairy Foods Research Centers and two Nutrition Institutes provide much of the research. Their location and the research objectives are listed in

Appendix F-1. Additionally, lists of DMI's dairy foods and nutrition projects are contained in **Appendices F-2** and **F-3**, respectively. Universities and other industry researchers throughout the U.S. compete for these research contracts.

In 2000, the DMI Board consisted of 12 dairy farmers from the Dairy Board and 12 dairy farmers from the UDIA Board. The Dairy Board officers are automatically appointed to the DMI Board, and the Dairy Board Chair appoints the remaining Dairy Board representatives to the DMI Board. An amendment to the articles of incorporation of DMI to expand the DMI Board size beginning in January 2001 was passed by both boards in August 2000. The expanded DMI Board is comprised of all Dairy Board and all UDIA Board members. The initial DMI Board structure – whereby a smaller group oversaw the Dairy Board/UDIA relationship – is no longer necessary.

The committees for program activities are comprised of board members from both the Dairy Board and UDIA Boards. The Dairy Board and UDIA Boards separately must approve the DMI budget and annual plan before they can be implemented. In 1997, a three-year domestic and export marketing plan was developed and approved separately by these joint Boards (for implementation in 1998, 1999, and 2000). In October 2000, both boards approved a 2001 unified dairy promotion plan budget and national implementation programs. Earlier in 2000, DMI held a series of dairy director regional planning forums across the country to review and to develop marketing strategies for a unified dairy promotion plan. These forums were designed to create one unified dairy promotion plan and allow opportunity for State and regional dairy board members to ask questions, raise concerns, and

offer their thinking on the direction and development of a unified dairy promotion plan. The 2001 unified dairy promotion plan is designed to spend money where consumers are – not where dairy cows are. The plan will be consistently implemented in demand-building consumer markets nationwide. In addition to funding from the Dairy Board, the unified dairy promotion plan will leverage resources from State and regional organizations, the Fluid Milk Board, the U.S. Dairy Export Council, and UDIA. These organizations will turn their attention to developing a new five-year strategic direction for the unified dairy promotion plan in 2001.

The joint Dairy Board and UDIA Board committee structure provides the framework for DMI program activities. The Dairy Board and UDIA Board Chairs assign their respective board members to the following joint program committees: Cheese, Communications and Technology, Export and Nonfat Dry Milk and Whey, and Fluid Milk. Each committee elects a Chair and a Vice-Chair. The joint committees and the DMI staff are responsible for setting program priorities, planning activities and projects, and evaluating results. Two additional ad-hoc committees were added during 2000: the Joint Industry Partnering Committee and the Joint Evaluation Committee. The Dairy Board and UDIA Board review and approve all DMI activities. During 2000, the Dairy Board and UDIA Board met jointly six times.

Website www.dairyinfo.com provides up-to-date information about the dairy checkoff program and industry news. The website also provides links to other local, State, and regional promotion organizations and activities. The following information describes the activities for each program committee during 2000. **Appendix E-1** contains

the DMI and Dairy Board contracts for projects reviewed by USDA during 2000.

CHEESE

The DMI umbrella cheese campaign "Ahh the power of Cheese™" (formerly "Behold the power of Cheese™") continued to promote cheese directly toward "Cheese Lovers," with an emphasis on cheese "Cravers" and cheese "Enhancers." Cheese "Cravers" eat cheese primarily as-is directly out of the package or off the block and have cheese as an important component of their food consumption routine. Cheese "Enhancers" have equally positive attitudes toward cheese, but their consumption primarily takes the form of cheese as an ingredient in meal preparation. As in previous years, the DMI cheese advertising campaign continued to be recognized for creative excellence, winning numerous awards from national and international groups, **Table 1-1** contains a listing of DMI's 2000 cheese advertising executions.

TABLE 1-1 2000 Dairy Management Inc. Cheese Advertising

Television	Print
Election	Candidate
Mr. Giggles	Football
Hook	Hook
Clay Fishing	Pasta
Santa	Holiday
Moon	Peppers*
Mom	Chicken & Cheese*
	Artichoke*

SOURCE: Dairy Management Inc. (*Denotes Trade and Foodservice Print Advertising)

As in previous years, the cheese marketing effort included major retail co-marketing programs implemented in supermarkets representing more than 60% of U.S. retail grocery sales volume. In these efforts, DMI provides retailer-customized media (television, radio, or direct mail) and in-store sampling, which are combined with the retailer's own advertising and merchandising support to drive cheese sales. Research has consistently shown that these co-marketing programs contribute to increased cheese category volume for participating stores.

In foodservice, DMI continued to implement trade advertising and public relations campaigns to keep cheese top-of-mind with restaurant operators. The trade print advertising is listed in **Table 1-1**. DMI also worked closely with selected national restaurant chains, including Pizza Hut, Burger King, and Wendy's, to drive cheese volume and ensure that cheese was prominently displayed in menu items. For example, DMI teamed with Pizza Hut® menu developers to create several new cheese-friendly pizzas, including the "Insider" pizza, which used a 6-cheese blend (Parmesan, Romano, Mozzarella, Monterey Jack, Provolone, and Cheddar) on a medium pizza between two thin crusts, using one pound of cheese, which is double the usual amount. Pizza Hut® sold 20 million "Insider" pizzas during the 13-week promotion, using 21 million pounds of cheese. Also, DMI worked with Pizza Hut® to develop and feature the "Ultimate Cheese Pizza," which also combined six different types of cheese, using more than one pound of cheese. The "Insider" and "Ultimate Cheese Pizza" used a combined total of approximately 26 million pounds of cheese.

DMI also executed a comprehensive product publicity program for cheese in 2000. The cheese product publicity

leveraged the continued success of the "Ahh the power of Cheese™" advertising campaign. For the fifth consecutive year, DMI partnered with Mr. Food® and executed a new program called the "Mr. Food® Good Mornings with Cheese Recipe Contest." Mr. Food® demonstrated the grand-prize winning recipe on his nationally syndicated television show, which reached over 10 million viewers. Other cheese publicity highlights included "Savvy Snacking" and "America's Cheese Profile" programs. "Savvy Snacking" featured a half-page advertorial in *TV Guide* magazine and encouraged consumers to think cheese when they're craving a snack. "Savvy Snacking" also kicked off the "Big Cheese Snacking Contest," which asked consumers to submit a recipe inspired by their favorite television show. The winning recipe was featured in a later issue of *TV Guide*. "America's Cheese Profile" was designed to help consumers determine their ideal cheese by participating in an interactive online survey executed through the website www.ilovecheese.com. The website is sponsored by the American Dairy Association®, whose programs are managed by DMI. In addition to participating in programs such as "America's Cheese Profile," cheese lovers can use the website for cheese information such as recipes, a "Cheese Bytes" e-mail newsletter, and sections that feature famous chefs, recipes, and serving ideas.

Another program, the Cheese News Network (CNN), is a quarterly news bureau program designed to keep fresh ideas about cheese in the news. In February 2000, CNN leveraged "Love Affairs with Cheese," a media activity timed to coincide with Valentine's Day, and focused on romantic meals with cheese. In addition, a full-page advertorial complementing the "Love Affairs" program appeared in the February issue of *Redbook* magazine. The

advertorial featured a recipe for "Chicken, Provolone Cheese and Swiss Roulades with Pineapple Rice" and an essay contest asking consumers to answer the question: "What is the most romantic Cheese and why?"

DMI's product research activities for cheese during 2000 featured extensive investigations of manufacturing methodology, ripening, stability and physio-chemical rheology, and functional properties of cheese. Specific models for evaluating Cheddar, Swiss, Italian, and process cheeses were incorporated into several projects. Also, in December 2000, DMI sponsored the first-ever Cheese Forum, which brought together over 100 dairy research and business leaders for an intense two-day planning session that explored current cheese research projects and the cheese marketplace. The goal of the forum was to solicit industry input on what direction DMI's national research plan for cheese should take and what types of research need to be explored and funded in the future. The outcomes and suggestions received at the Forum will be used in DMI's 2001 research planning process.

In 1997, cheese consumption was 28.0 lbs./person. DMI set a 3-year cheese consumption goal of 30.5 lbs./person by the year 2000. The goal has been achieved, as per capita consumption in 2000 was 30.5 pounds.

COMMUNICATIONS AND TECHNOLOGY

Consumers receive mixed messages through the media about the nutritional value and benefits of food. DMI worked to provide consumers with education and information based on sound nutritional science and communicated the value of dairy products to consumers, as well as health professionals and educators.

DMI also worked to inform dairy farmers about how their assessment dollars were being used. DMI continued to use its system of communicating to dairy producers and other industry audiences through publications (such as the annual report, joint newsletters with State and regional dairy promotion groups, and dairy cooperative check stuffers), dairy industry events (including major trade shows and producer meetings), and media relations (including press releases, feature placements, and farm broadcast interviews). DMI continued its 3rd year of the "Dairy Ambassadors" program, a program which uses a select group of dairy farmers to further deliver consistent messages about the dairy promotion program to dairy producers and other industry audiences.

DMI continued its support for butter through cooperation and public relations activities with the American Butter Institute. The website www.butterisbest.com continues to be a resource center with current cooking trends and ideas, butter recipes, and links to other butter-related sites.

DMI's Chair, CEO, and board members participated in meetings with dairy cooperatives, industry associations, processors, and other groups throughout the country. The Dairy Board and the UDIA House of Delegates also agreed to continue having dairy director regional planning forums in 2001 and are planning to have a national dairy director forum, to bring together dairy farmers from all over the country to share ideas and thoughts about future dairy promotion activities.

Another activity of the Communications and Technology program was the issues management program. The objective of this program was to identify, monitor, and manage key issues that may influence consumers perceptions of dairy products. DMI coordinated its issues management activities with State and regional dairy promotion groups, as well as other dairy and agricultural groups. DMI worked with these groups to bring forth sound, science-based information to deal with consumer issues. Dairy Reputation Management, an industry-wide effort that interacts with the Issues Management, Industry Relations, and Dairy Image Programs, continued a proactive program to reinforce the positive attributes of dairy foods and dairy farmers in the minds of consumers.

Farmer-funded research continues to demonstrate that dairy products are a necessary food component in the diet of all people throughout the life cycle. Research continues to focus on colon cancer and other diseases that may see decreases in occurrence as a result of consuming dairy foods. Additionally, ongoing nutrition research is validating discoveries about the potential benefits of dairy food consumption in reducing obesity. Transfer of these research outcomes has enhanced the image of the healthfulness of dairy foods by many health profressional organizations, which continue to endorse the role of dairy foods in a healthy diet. Product research addresses safety and quality issues, continues to examine new milkfat-based ingredients, and provides technical support to the marketing of these ingredients.

EXPORT and NONFAT DRY MILK and WHEY

DMI's export enhancement program is implemented by the U.S. Dairy Export Council (USDEC). USDEC receives primary funding from three sources: DMI,

USDA's Foreign Agricultural Service (FAS), and membership dues from dairy cooperatives, exporters, and suppliers. In 2000, USDEC received $6.1 million from DMI; 2.1 million from USDA's Foreign Market Access Program and the Market Promotion Program that support commodity groups in promotion of their commodities in foreign markets; and $630 thousand from membership dues – with dues from an all-time high of 75 members. USDEC began its fifth year of operation in 2000.

USDEC currently has offices in Mexico City, Tokyo, Seoul, Hong Kong, Shanghai, Bangkok, and Sao Paulo. Activities in Mexico concentrated on whey, milk powders, ice cream, and cheese; in Japan and Korea, cheese and whey proteins and derivatives; in China, whey proteins and derivatives and skim milk powder; and in other Southeast Asian markets, skim milk powder and whey proteins and derivatives. The programs were carried out through supermarket and food service trade missions, retail sampling, quarterly trade newsletters, booths at trade fairs, and seminars about American dairy products presented to the press, end-users and food distributors.

USDEC continued working to improve the export capabilities of domestic dairy companies. Final 1999 statistics released in mid-2000, confirmed that U.S. dairy product exports broke the $1 billion ceiling for the first-time ever. U.S. exporters also topped last years whey and whey protein concentrate sales. Rising global demand for milk proteins in a variety of applications is helping to drive the growth. As a result of USDEC's Japan trade servicing programs, a major dairy company launched a new beverage during the summer of 2000 containing U.S. whey protein concentrate. Sales exceeded company expectations by 20% in the first selling season. Other successes include a leading Singapore bakery, which received

technical training from USDEC, joined a trade mission to the U.S. and, as a result, adopted U.S. whey for its line of premium baked goods. Without the assistance of USDEC, U.S. exporters would not have the opportunities or market available for these types of activities. For 2001, USDEC will continue to focus a significant portion of its market development programming toward the whey sector.

USDEC continued its maintenance of a comprehensive series of export reference manuals (now available on CD-ROM) that provide up-to-date information on market conditions, global regulations, and procedures for export. USDEC provided opportunities for domestic suppliers of dairy products to meet potential importers through reverse trade missions. Additionally, www.usdec.com provides information for the public as well as other information for its members.

Nonfat dry milk and whey efforts were delivered through advertising, public relations, trade shows, and the web site www.doitwithdairy.com. the advertising theme "Do it with Dairy®" was utilized throughout all activities. There are several newsletters and other quarterly publications that support this program. "Dairy Dimensions," a quarterly newsletter, focuses on developments in dairy technology research. The "Dairy Ingredients Insider," a newsletter where dairy ingredient suppliers are able to track buyers' attitudes, behaviors, buying patterns, and product development plans, has become a key planning tool for some suppliers. It is designed to enable suppliers to become more effective and valuable by utilizing and leveraging market research created by DMI.

"Ingredient Insights," designed expressly for food formulators and ingredient suppliers, provides news

about dairy ingredients and specific applications technical support resources. As a part of this program, DMI provides ingredient technical support systems for food technologists. The system features four tiers, enabling food technologists to request the level of support they find the most useful. The options range from requesting technical information via FAX-ON-DEMAND to direct dialogue with a researcher.

"Innovations in Dairy," a technical bulletin that details new dairy science and technology information and research, is executed through a series of authoritative, topical updates written from a practical perspective for the lay reader.

Research continues to focus on nonfat dry milk and whey in the areas of functionality, quality, packaging, and new applications. In addition, the application laboratory for nonfat dry milk at California Polytechnic State University and the whey application laboratory at the University of Wisconsin Center for Dairy Research continued to provide technical assistance to both those that produce the ingredients and those that use the ingredients in finished products. Also, website www.extraordinarydairy.com provides a network of resources and information to help the dairy and food industries bring innovative products, formulations, and processes to market.

Information on integrated fluid milk advertising, promotions, public relations, school marketing, strategic thinking, and other activities that include DMI, State and regional organizations, and the Fluid Milk Board, is detailed in the national fluid milk integrated program summary in this chapter.

Qualified State or Regional Dairy Product Promotion, Research, or Nutrition Education Programs

Qualified Programs are certified annually by the Secretary. To receive certification, the Qualified Program must: (1) conduct activities that are intended to increase human consumption of milk and dairy products generally; (2) have been active and ongoing before passage of the Dairy Act, except for programs operated under the laws of the United States or any State; (3) be primarily financed by producers, either individually or through cooperative associations; (4) not use a private brand or trade name in its advertising and promotion of dairy products (unless approved by the Dairy Board and USDA); and (5) not use program funds for the purpose of influencing governmental policy or action (7 CFR 1150.153). A list of the 62 active programs is provided in **Appendix G**.

The aggregate revenue from the producers' 15-cent per hundredweight assessment directed to the Qualified Programs in 2000 was $169 million (approximately 10 cents out of the 15 cents assessment). The Qualified Programs manage State or regional dairy product promotion, research, or nutrition education programs (**Tables 1-2 and 1-3**).

Some of these Qualified Programs participate in cooperative efforts conducted and coordinated by other Qualified Programs and/or other organizations such as DMI, the Dairy Board, and UDIA. Their goal in combining funding and coordinating projects is a more effective and efficient management of producers' promotion dollars through larger, broad-based projects. For example, UDIA coordinates nationally through DMI, programs and resources for 18 federation members and their affiliated units.

TABLE 1-2 Aggregate Income and Expenditure Data Reported by the 62 Active Qualified Programs to USDA

	1999 (in $000's)		2000 (in $000's)	
INCOME				
Carryover from Previous Years	42,591[1]		50,085[1]	
Producer Remittances	163,228		169,996	
Payments Transferred from Other Qualified Programs[2]	54,415		52,402	
Payments Transferred to Other Qualified Programs[2]	(55,109)		(53,457)	
Other[3]	4,635		5,991	
Total Adjusted Annual Income	209,760		225,017	
EXPENDITURES				
General & Administrative	7,695	[4.8%]	7,375	[4.3%]
Advertising & Sales Promotion	107,575	[66.8%]	117,040	[69.0%]
Dairy Foods & Nutrition Research	5,137	[3.1%]	5,849	[3.4%]
Public & Industry Communications	12,876	[8.0%]	13,691	[8.1%]
Nutrition Education	23,363	[14.2%]	22,619	[13.3%]
Market & Economic Research	1,725	[1.1%]	1,787	[1.1%]
Other[4]	2,790	[1.7%]	1,293	[0.8%]
Total Annual Expenditures	161,161	[100%]	169,654	[100%]
Total Available for Future Year Programs	48,599[1]		55,363	

[1] Differences are due to audit adjustments and varying accounting periods.

[2] Payments transferred between Qualified Programs differ due to different accounting methods and accounting periods.

[3] Includes interest, income from processors and handlers, sales of supplies and materials, contributions, and rental income.

[4] Includes capital expenses and contributions to universities and other organizations.

SOURCE: Aggregate income and expenditure data reported by the 62 active Qualified Programs to USDA.

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TABLE 1-3 Aggregate Advertising Expenditures Data Reported by the 62 Active Qualified Programs to USDA

	1999 (in $000's)		2000 (in $000's)	
ADVERTISING PROGRAMS				
Fluid Milk	49,371	[45.9%]	50,195	[42.9%]
Cheese	50,964	[47.4%]	58,865	[50.3%]
Butter	133	[0.1%]	217	[0.2%]
Frozen Dairy Products	138	[0.1%]	748	[0.6%]
Other[1]	6,969	[6.5%]	7,015	[6.0%]
Total	107,575	[100%]	117,040	[100%]

[1] Includes "Real Seal," holiday, multi-product, calcium, evaporated milk, food service, product donations at State fairs and other events, and contributions for displays or promotional events.

SOURCE: Aggregate income and expenditure data reported by the 62 active Qualified Programs to USDA.

National Fluid Milk Processor Promotion Board

The Fluid Milk Board, as authorized in the Fluid Milk Promotion Act of 1990 (Fluid Milk Act), administers a fluid milk promotion and consumer education program that is funded by fluid milk processors. The program is designed to educate Americans about the benefits of milk, increase fluid milk consumption, and maintain and expand markets and uses for fluid milk products in the contiguous 48 States and the District of Columbia.

The Secretary of Agriculture appoints 20 members to the Fluid Milk Board. Fifteen members are fluid milk processors who each represent a separate geographical region, and five are at-large members. Of the five at-large members, at least three must be fluid milk processors and at least one must be from the general public. Three fluid milk processors and two public members serve as at-large members on the current Fluid Milk Board. The members of the Fluid Milk Board serve 3-year terms and are eligible to be appointed to two consecutive terms. Current Fluid Milk Board members are listed in **Appendix A-2**. A map of the Fluid Milk Board regions is shown in **Appendix B-2**.

The Fluid Milk Board elects four officers: Chair, Vice-Chair, Secretary, and Treasurer. Fluid Milk Board members are assigned by the Chair to the following committees: Advertising, Finance, Promotions, Public Relations/ Medical and Scientific, and Strategic Thinking. The program committees are responsible for setting program priorities, planning activities and projects, and evaluating results. The Finance Committee reviews all program authorization requests for funding sufficiency, the Fluid Milk Board's independent financial audit, and the work of

the Board's accounting firm. The Fluid Milk Board met four times during its 2000 fiscal year.

The Fluid Milk Program is funded by a 20-cent per hundredweight assessment on fluid milk products processed and marketed commercially in consumer-type packages in the contiguous 48 States and the District of Columbia. The program exempts from assessment those processors who process and market 500,000 pounds or less of fluid milk products each month. Assessment generated $109 million in 2000. The Fluid Milk Order requires the Fluid Milk Board to return 80 percent of the funds received from California processors to the California fluid milk processor promotion program. For 2000, the amount returned to California from the assessments was approximately $10 million. The California fluid milk processor promotion program uses the funds to continue its promotion activities, which include the got milk?® advertising campaign.

The actual income and expenses for 1996-2000 are in **Appendix C-4**. The Fluid Milk Board's administrative expenses continued to be within the 5-percent-of-assessments limitation required by the Fluid Milk Order. USDA's oversight and evaluation expenses for 1996-2000 are in **Appendix C-5. Appendix C-6** contains the Fluid Milk Board's approved budgets for 1997-2001. **Appendix D-2** contains an independent auditor's reports for the period of January 1, 2000, through December 31, 2000.

The following summarizes Fluid Milk Board medical and scientific activities for the period of January 1, 2000, through December 31, 2000. The Fluid Milk Board's advertising, promotions, public relations, school marketing, and strategic thinking activities are incorporated in the National Fluid Milk Integrated Program summary.

MEDICAL AND SCIENTIFIC

The Fluid Milk Board has established a Medical Advisory Board (MAB) comprised of academic, medical, and healthcare professionals with expertise relevant to the health benefits of fluid milk. The MAB provided guidance to the Fluid Milk Board's development of key nutritional and health messages for consumers and health professionals. The MAB also reviewed nutrition and health messages for accuracy. The MAB members assisted the Fluid Milk Board in forging relationships with health organizations such as the American Heart Association, the National Osteoporosis Foundation, the American Dietetic Association, American Academy of Pediatrics, and the National Medical Association. They also appeared as medical professionals in the media, providing science-based statements supporting the health benefits of milk.

The medical and scientific activities of the Fluid Milk Board also included preparing press materials and acting as spokespersons on breaking research with relevance to fluid milk. The Fluid Milk Board created consumer and health professional materials to explain this research. The Dietary Approaches to Stop Hypertension (DASH) diet continues to be a major focus of activity. Research on the DASH diet shows that by eating a diet rich in nonfat or lowfat dairy products and fruits and vegetables many people can reduce their blood pressure with or without medication. In addition to the "Reduce Your Risk" and "The Diet-Blood Pressure Connection" brochures and press materials about DASH diets, the Fluid Milk Board implemented new initiatives on high blood pressure and lactose intolerance.

The Fluid Milk Board developed a program which spotlights the high incidence of high blood pressure among African Americans and promotes milk and milk products as a dietary solution as part of the DASH diet. The program also addresses misconceptions about lactose intolerance and shows why it should not be a barrier to including milk in the diet. In addition, the Board launched a lactose intolerance initiative that focuses on educating African Americans on the importance of incorporating milk into their diet. The programs provided educational material on osteoporosis and lactose intolerance.

The Fluid Milk Board also created several educational brochures such as "Shake Up Your Shape Up Plan," "Calcium for 2," "Milk The Power Play," and "Choc It Up." The brochures targeted specific audiences and included nutritional facts and messages about milk to encourage persons to keep milk as part of their diet.

National Fluid Milk Integrated Program

The Fluid Milk Board and DMI continued to implement during 2000 an integrated fluid milk marketing plan which is research-based, message-focused, and jointly managed. This integrated marketing effort began in 1998 and the transition to total integration was successfully completed in January 1999. The 2000 funding level totaled approximately $180 million, with $86.5 from DMI and State and regional organizations and about $94.1 million from the Fluid Milk Board.

The purpose of the integrated program is to positively change the attitudes and purchase behavior of the country regarding fluid milk. Many communication avenues were used to accomplish this objective, including television and print advertising, public relations, promotions, and others. The program's target audience includes: kids 6-11; teen girls and boys 12-17; college men and women 18-21; women 18-49; men 18-34; moms 18-34; and minorities (Hispanics and African Americans).

In 2000, the Fluid Milk Board continued the Milk Mustache/got milk?® advertising campaign. The campaign provides the basis for advertising activities and other program delivery methods. The got milk?® tagline and the Milk Mustache campaign were successfully merged in 1999.

A description follows of the 2000 integrated program activities for the Fluid Milk Board and DMI.

ADVERTISING

The Fluid Milk Board and DMI launched their first integrated television advertisements in October 1999. The commercials included "Milk Carton Guy" and "Old Guys," which were targeted to the teen and adult audiences, and "Super Mario," which featured a popular video game character and was developed for the kid audience. The commercials continued to air throughout 2000. These commercials and the subsequent television advertisements developed in 2000 as part of the integrated effort highlight specific, relevant, health-benefit messages about milk and its nutrient package.

In 2000, the Fluid Milk Board and DMI television expenditures totaled $57.5 million. The integrated television marketing effort was increased to include 52 weeks of national television for kids, and for adults, 30 weeks of national television, 20 weeks of cable television, and 10 weeks of prime television. New commercials developed and launched during 2000 were "Super Heroes," which targeted both the adult and kid audiences with health-benefit messages, and "Fame Game," which supported the first-ever national on-pack (cap) promotion. In addition to these commercials, several other creativity concepts were developed and tested. **Table 1-4** provides a complete listing by target audience of the 2000 fluid milk television advertising. Total television advertising expenditures on each target audience were as follows: adult – $34.7 million and kids – $22.8 million.

TABLE 1-4 2000 Fluid Milk Television Advertising

Kids Television	Adult Television	Hispanic Television
Super Mario	Santa	New Mother*
Milk Carton Guy – Basketball	Milk Carton Guy – Basketball	I Don't Know (Nese)*
Super Heroes	Old Guys	Generation 5*
	Fame Game – Fan	Memories 1*
	Fame Game – Little Girl	Memories 2*
	Super Heroes	Telephone TV*

SOURCE: Dairy Management Inc., and the Fluid Milk Board. (*Indicates advertising developed by California and used by State and Regional Organizations.)

In addition to television media, the integrated program completed a full year of fluid milk print advertising through

the Milk Mustache/got milk?® campaign. The campaign used celebrity advertising in over 100 magazines, outdoor billboards, and other print vehicles to address messages on osteoporosis, growth, active/energy, bone health, and other important nutrition benefits. The Fluid Milk Act and Fluid Milk Order state that the advertising coverage in each of the Board's regions is to be proportionate to funds collected from each respective region. The integrated program used outdoor billboards and regional magazines to fulfill this requirement. **Table 1-5** contains a complete listing of the 2000 fluid milk print advertisements.

The integrated program also continued "Moment ads" that work around special events and create an awareness of milk. Such ads included "Super Bowl," "Survivor," and a "2000 Olympics" winner ad.

The integrated program also was able to generate media-driven promotions from the magazines that are used to extend the campaign. These promotions were created to add a consumption-driven element to the advertising program. Some successful promotions included the "Mad About Milk" contest in *Seventeen Magazine*, Milk and Fox Family "Show and Tell" sweepstakes in *USA Today* and on the Fox Family Channel, "Milk Mustache Posters" contest in *TV Guide*, and the "Scholar Athlete Milk Mustache of the Year" (SAMMY) Award. The SAMMY winners appeared in a milk mustache ad in *USA Today, Sports Illustrated*, and *ESPN The Magazine*.

TABLE 1-5 2000 Fluid Milk Print Advertising

Celebrity	Target	Theme
Super Bowl	Men/Women	Active
Britney Spears	Teens/Men/Women	Growth
Coaches (Joe Torres, Jeff Fisher, Pat Riley)	Men/Kids/Moms/Women	Active
Dixie Chicks	Moms/Women/Men	Strong Bones
Elton John	Women/Men	Osteoporosis/
	Women/Moms/Kids/Men/	Strong Bones
Jackie Chan	Teens	Strong Bones
Kurt Warner	Moms/Men	Active
Fankie Muniz	Women/Moms	Active/ Strong Bones
Marc Antony	Moms/Teens/Men/Women	Osteoporosis/ Strong Bones
Noah Wyle	Women/Moms/Men	Strong Bones
Pikachu	Kids/Moms	Growth
Rugrats	Teens/Kids/Moms/Women	Strong Bones
Rulon Gardner	Women/Moms/Men	Active
Sela Ward	Women/Moms/Men	Strong Bones/ Osteoporosis
Survivor	Men/Women/Moms	Active
Batman	Kids/Teens	Growth
Blue's Clues	Moms/Kids	Chocolate Milk
David Boreanaz	Women/Men/Moms/Teens	Osteoporosis
Everybody Loves Raymond	Women/Men/Moms	Osteoporosis
Super Mario	Teens/Moms/Kids	Growth/ Strong Bones
Pete Sampras	Men	Active
Rebecca Romijn-Stamos	Men	Osteoporosis
Superman	Kids/Teens	Strong Bones
Carson Daly	Teen Girls	Growth

Venus & Serena Williams	Men/Women	Active
Alex Trebek	Moms	Osteoporosis
Austin Powers	Teens	Active
Backstreet Boys	Teens	Osteoporosis
Curley	Men	Osteoporosis
Hulk	Teens/Kids	Active
Jeff Gordon	Men	Active
Jennifer Love Hewitt	Teens	Osteoporosis
Kermit	Men	Calcium
Mark McGuire	Men/Teens/Women	Active
Mia Hamm	Teens/Kids/Men/Women	Active
Patrick Ewing	Men/Teens	Active
Spiderman	Kids	Strong Bones
Stone Cold Steve Austin	Men	Active
Tony Hawk	Teens	Active
Tracy Ullman	Moms/Women	Osteoporosis
Whoopi Goldberg	Moms/Women	Lactose Intolerance
WNBA (Lisa Leslie, Nikki McCray, and Sheryl Swoopes)	Men/Women	Active

SOURCE: Fluid Milk Board.

PROMOTIONS

The Fluid Milk Board and DMI conduct promotions to increase fluid milk sales in retail outlets. The promotions work to move more milk out of the refrigerator of grocery stores, and to increase sales in other retail outlets such as convenience stores, independent grocery stores, and mass merchandisers. Some of the promotions work with partners to increase the appeal of the program when appropriate. After carefully measuring the results of the numerous promotion

strategies, promotion activity is now focused in areas that assure success which include feature incentives to increase advertisements and displays of milk, and on-pack (cap) programs offering prizes directly to consumers.

During 2000, the Fluid Milk Board and DMI conducted three national promotions. "Chocolate: The Wilder Side of Milk" promotion was a milestone in milk promotion history. The promotion was the milk industry's first-ever national chocolate milk promotion designed to increase chocolate milk sales through feature advertisements and dairy aisle displays of chocolate milk. Nearly 2,400 retailers participated in the promotion, which resulted in an unprecedented level of participation by independent grocery accounts. In addition to the high participation level, sales of chocolate milk increased by about 24% during the six-week promotional period. The net incremental volume was estimated to be 1.1 million gallons.

The "Milk Mustache Fame Game" was the first-ever national on-pack (cap) promotion for the dairy industry. Retail participation for this event surpassed levels of previous promotions. The promotion featured more than 200 million game pieces on white milk gallons and provided consumers a chance to win more than two million prizes including a grand prize of living as a milk mustache celebrity for a year. Additionally, a back-to-school fall promotion, featuring a popular teen music star, was designed to promote both white milk gallons and chocolate milk. The promotion targeted teens with the opportunity to win locker posters, discounts on merchandise, and a chance to win a day with a teen superstar.

The Fluid Milk Board and DMI worked with State and regional organizations to get their promotions extended at the local level. Processors and Qualified Programs obtain the Fluid Milk Board's promotional, advertising, and public relations materials from the Processor Hotline at 1-800-945-MILK (6455).

PUBLIC RELATIONS

The public relations programs continued to focus on the nutritional benefits of milk, emerging scientific studies which highlight milk's benefits, and preparing for and responding to misconceptions and negative news about milk or the educational campaign. A wide variety of initiatives were implemented to reach specific target audiences. During 2000, over two billion media impressions were garnered through the integrated public relations program. The program provided support for the three national promotions to build awareness and increase participation. The "Choc It Up" program, which supported the spring chocolate milk promotion, highlighted the calcium crisis among kids and encouraged moms to serve chocolate milk to their children by educating them about the health benefits associated with drinking chocolate milk.

The Fluid Milk Board and DMI's "Crash Course on Calcium" curriculum provided high school teachers with a video, poster, and teaching guide that helped to show the importance of calcium consumption through milk to prevent the possible onset of osteoporosis and stress fractures. The "Milk: Get Fit With It" program also educated teen athletes about milk's complete nutrient package, the role it plays in an active life

style, and why calcium is critical for growing bones.

The Milk Mustache Mobile "Get Moo-ving With Milk" tour partnered with the Council for Physical Fitness to educate Americans about the valuable combination of physical activity and drinking milk. The 126-city tour provided an interactive sports cage and fitness assessments to determine strength, flexibility, and body composition. Additionally, fitness experts assisted registered dietitians in conducting health consultations with consumers and offering nutrition and fitness advice.

Through a partnership with the National Institute of Child Health and Human Development, a "Pediatrician Calcium Check-Up/Get Up and Grow" program was implemented to encourage pediatricians, family physicians, and registered dieticians to promote increased calcium intake and the nutritional benefits of milk. Educational materials were developed for distribution to parents to help them encourage their children to drink milk for proper growth and development.

The Fluid Milk Board and DMI also launched a new lactose intolerance initiative with emphasis on minority outreach to offer simple ways for consumers to include milk and dairy products in their diets.

Brochures and other information on milk were made available to consumers through the website www.whymilk.com.

STRATEGIC THINKING

The Fluid Milk Strategic Thinking Initiative (FMSTI) is a joint effort of the Fluid Milk Board, DMI, the Milk Industry Foundation, processors, and suppliers. This ongoing effort was established to address barriers to fluid milk consumption not targeted by the advertising, promotion, and public relations activities of the Fluid Milk Board and DMI. In 1998, the Task Force began a series of research projects on how to improve fluid milk sales in five priority areas including vending, home-meal replacement, nutraceuticals, convenience stores, and food service. The FMSTI is focusing on increasing and expanding the availability of milk in these marketing channels. The results of research released during 2000 are discussed below.

Initial vending research identified opportunities for increased milk sales through vending machines. Based on this research, the task force conducted a 3-month test which placed a total of 45 vending machines in six markets. The dedicated milk machines and the combination milk and sweet snack machines were placed in airports, offices, industrial plants, hospitals, schools, and universities. The results of the research will allow milk companies to further refine their efforts in the vending marketing channel which currently represents only 1.4% of total food vending sales.

The Fluid Milk Board and DMI also partnered with Maytag Commercial Solutions to place 100 milk vending machines in middle and high schools in five markets across the United States. The test is designed to measure the velocity of sales to determine the demand, sales, and profit

potential of vending machines when placed in schools. Results will be available in 2001.

The FMSTI Convenience Store Task Force also identified growth opportunities with convenience stores. A case study revealed that single-serve milk and milk-gallon products currently receive a disproportionately low share of cooler space in convenience stores. Among single-serve non alcoholic beverages, milk receives only 5% cooler space despite an above average return on inventory invested. Consequently, FMSTI was instrumental in working with one of the largest operators of company controlled convenience stores in the United States to have milk designated as a strategic product for the grocery category.

The FMSTI also released a report which identified possible functional-food opportunities that exist for fluid milk products. Results from this research can be used to assist processors in developing fluid-milk based nutraceutical products.

FMSTI continues to examine marketing barriers and to offer ideas for increasing milk sales in other areas such as foodservice, home-meal replacement, and other growth opportunities.

SCHOOL MARKETING

The National Dairy Council® (www.nationaldairy council.org), whose programs are managed by DMI and the Fluid Milk Board, works with school foodservice professionals and teachers to raise student awareness of the importance of having milk and dairy products as a part of a healthy lifestyle. The integrated milk program was extended into schools through school foodservice

professionals using posters and other tie-in promotions. Reaching kids through the classroom with various programs was the focus of nutrition education efforts. "Chef Combo's Fantastic Adventures" was placed in 80% of pre-school kindergarten sites nationally. "Pyramid Café®" and "Pyramid Explorations™," targeted to second and fourth grades, has reached over 10.6 million with milk and dairy health messages. A survey showed a utilization rate of over 70% of the instructors that have the programs.

Another popular school foodservice program in 2000 was the got milk?® get S.M.A.R.T. program. The program's goal is to increase milk sales in the top 3,000 school districts. Schools receive points for increased main line milk sales and for offering a-la-carte fluid milk products during breakfast and lunch periods to help increase overall sales and usage of single-serve milk products in plastic containers. The points can be redeemed for milk coolers and other customized foodservice equipment.

Effective July 1, 2000, www.familyfoodzone.com is now linked to www.nutritionexplorations.org and the newly combined site features information for teachers and consumers. The site includes lesson plans for educators, resources for school foodservice directors, ideas for smart eating for families, and fun activities for kids. In addition, the Family Food Zone section of the site recently won a Silver Award in the Education Division of Health Promotion and Injury Prevention from the World Wide Web Health Awards.

OTHER RESEARCH

In June 2000, DMI sponsored the first-ever Fluid Milk Research Forum. The purpose of the forum was to bring together dairy researchers and business leaders for an update on current fluid-milk research and obtain critical feedback and input for future research priorities. At the forum, DMI was able to get significant input on what types of fluid-milk research need to be explored and funded in 2001. Suggested areas of research included probiotics, nutraceuticals, extended shelf-life, and several others.

2000 milk-related nutrition and product research was conducted in the following areas:

1. The role of milk and milk products in the prevention of colon cancer and reduction of blood pressure.
2. Establishing the genetic basis for the activity of probiotic cultures.
3. Demonstration of milk consumption by teens to meet their calcium needs without adversely affecting weight.
4. The role of milk and calcium in the diet of kids and moms.
5. Technology for the development of milk-based products as carriers of probiotics and nutraceuticals.

CHAPTER 2

UNITED STATES DEPARTMENT OF AGRICULTURE

Dairy Programs of the U.S. Department of Agriculture's (USDA) Agricultural Marketing Service (AMS) has the day-to-day oversight responsibilities for the National

Dairy Promotion and Research Board (Dairy Board) and the National Fluid Milk Processor Promotion Board (Fluid Milk Board). Dairy Programs oversight activities include reviewing and approving the Dairy and Fluid Milk Boards' budgets and budget amendments, contracts, advertising campaigns, and investment plans. Approval of program materials is also a responsibility of USDA. Program materials are monitored for conformance with their respective Acts and Orders and with other legislation such as the Nutrition Labeling and Education Act.

Dairy Programs continues to insure that the collection, accounting, auditing, and expenditure of generic promotion funds is consistent with the enabling legislation and orders; to qualify State or regional dairy product promotion, research or nutrition education programs (Qualified Programs); and to provide for evaluation of the effectiveness of both programs' advertising campaigns. USDA also assists the Boards in their assessment collection, compliance, and enforcement actions. Other USDA responsibilities relate to the nominating and appointing of Board members, amending the orders, conducting referenda, and conducting periodic program audits. USDA representatives attend full Board and Board committee meetings.

During November 1998, USDA formed a Task Force on Research and Promotion Boards to review oversight and operations of all agricultural commodity research and promotion boards. In December 1999, the Secretary endorsed the recommendations of the Task Force and invited interested persons to submit comments on the proposed guidelines for changes in oversight procedures for promotion and research programs by June 30, 2000. The Department has not yet issued final changes to its guidelines for oversight of promotion and research programs.

National Dairy Promotion and Research Board Oversight

NOMINATIONS AND APPOINTMENTS

The 36 members of the Dairy Board who administer the program serve 3-year terms, with no member serving more than two consecutive terms. Dairy Board members are selected by the Secretary of Agriculture from nominations submitted by producer organizations, general farm organizations representing other producers, Qualified Programs, or other sources.

Forty-five nominations were received by USDA for the 12 Dairy Board members whose terms expired October 31, 1999. A press release issued on November 2, 1999, announced the appointment of seven new members and five incumbents for 3-year terms ending October 31, 2002. Newly appointed members were: John Zonneveld, Jr., Laton, California (Region 2); John B. Stacks, Damacus, Arkansas (Region 4); Patricia M. Boettcher, Bloomer, Wisconsin (Region 6); Janet M. Nelson, Prairie Farm, Wisconsin (Region 6); Joseph P. Logan, Kinsman, Ohio (Region 9); Rita Kennedy, Valencia, Pennsylvania (Region 11); and Claude J. Bourbeau, Swanton, Vermont (Region 13). Re-appointed to serve second terms were: Paul E. Rovey, Glendale, Arizona (Region 3); Glen E. Schroeder, Caledonia, Minnesota (Region 5); William B. Siebenborn, Trenton, Missouri (Region 7); James S. Cook, Evergreen, Alabama (Region 8); and Ruth I. Laribee, Lowville, New York (Region 12).

In addition, forty-two nominations were received by USDA for the 12 Dairy Board members whose terms expired October 31, 2000. A press release issued on October 2, 2000, announced the

appointment of ten new members and two incumbents for 3-year terms ending October 31, 2003. Newly appointed members were: Dennis A. Leonardi, Ferndale, California (Region 2); Charles W. Bryant, Austin, Arkansas (Region 4); Arlon E. Fritsche, New Ulm, Minnesota (Region 5); Loren E. Jons, Bonesteel, South Dakota (Region 5); Allard L. Peck, Chippewa Falls, Wisconsin (Region 6); Connie M. Seefeldt, Coleman, Wisconsin (Region 6); Wayne E. Dykshorn, Ireton, Iowa (Region 7); Sanford L. Jones, Jr., Quitman, Georgia (Region 10); Lewis Gardner, Galeton, Pennsylvania (Region 11); and Edgar A. King, Schuylerville, New York (Region 12). Reappointed to serve second terms were: Pete R. Lizaso, Emmet, Idaho (Region 3); and Merle L. Chaplin, Moundsville, West Virginia (Region 9).

There was one resignation from the Dairy Board in 2000. John B. Stacks, Damascus, Arkansas (Region 4), resigned and was replaced by Neil A. Hoff, Windthorst, Texas. His term expires October 31, 2002.

Lists of current Dairy Board members appear in **Appendix A-1**. **Appendix B-1** is a map of the contiguous 48 States depicting the 13 geographic regions under the Dairy Promotion and Research Order (Dairy Order).

FOREIGN AGRICULTURAL SERVICE

The Secretary of Agriculture has delegated oversight responsibility for all foreign market development activities outside the United States to the Foreign Agricultural Service (FAS) (7 CFR 2.43(a)(24)). FAS reviews the U.S. Dairy Export Council's (USDEC) foreign market development

plan and related export contracts. USDEC export contracts also are reviewed by AMS Dairy Programs to ensure conformance with the Dairy Production Stabilization Act of 1983 (Dairy Act) and Dairy Order and with established policies. The USDA's Foreign Market Access Program and the Market Promotion Program provided matching funds to USDEC for dairy product promotion and market research in Japan, Mexico, Southeast Asia, South Korea, and Latin America.

CONTRACTS

The Dairy Act and Dairy Order require that all contracts expending producer funds be approved by the Secretary (7 CFR 1150.140). During 2000, USDA reviewed and approved 172 Dairy Board and Dairy Management Inc. (DMI) agreements, amendments, and annual plans. Funding approvals were from the 1996, 1997, 1998, 1999, and 2000 fiscal periods. See **Appendix E-1** for the contractors and the initiatives approved by USDA during 2000.

CONTRACTOR AUDITS

During 2000, DMI retained the certified public accounting firm of KPMG Peat Marwick to audit the records of the following: Northeast Dairy Foods Research Center, Cornell University; PR Consultants, LTD; McCracken Brooks Maier; DDB-Chicago, Inc.; and Elrick & Lavidge for projects in dairy foods research, export (through USDEC), school foodservice, cheese advertising services, and marketing research, respectively. DMI is implementing the audit recommendations for improving management and internal controls over contracts.

COLLECTIONS

The Dairy Act specifies that persons who pay producers and producers marketing milk directly to consumers, commonly referred to as "responsible persons," shall remit assessments to the Dairy Board or to Qualified Programs for milk produced in the United States and marketed for commercial use.

The Dairy Act provides that dairy farmers can direct up to 10 cents of their 15-cent per hundredweight assessment to Qualified Programs. During 2000, the Dairy Board received about 5.11 cents of the 15-cent assessment.

COMPLIANCE

Compliance by responsible persons in filing reports and remitting assessments continues in a timely manner and at a high rate. Only minor differences were discovered when comparing the audit results to what was reported by the responsible persons. The Dairy Board also verifies that the credits claimed by responsible persons are actually sent to Qualified Programs. This verification is done by contracts with each Qualified Program.

When non-compliance exists, the Dairy Board takes initial action on the matter. If the Dairy Board is unsuccessful in resolving the violation, the matter is referred to USDA for further action. In 2000, the Dairy Board referred one case to USDA for resolution. USDA, through the National Finance Center, the Office of the General Counsel, and the Department of Justice, has initiated legal action to enforce the Dairy Order.

QUALIFIED PROGRAMS

USDA reviewed applications for continued qualification from 62 Qualified Programs. A list of the 62 active Qualified Programs is provided in Appendix G. In line with its responsibility for monitoring the Qualified Programs, USDA obtained and reviewed income and expenditure data from each of the Qualified Programs. The data reported from the Qualified Programs are included in aggregate form for 1999 and 2000 in **Tables 1-2** and **1-3**.

On December 31, 1999, Federal Order No. 49 advertising and promotion program was terminated as a result of implementation of Federal Order Reform on January 1, 2000.

As of January 1, 2000, the American Dairy Association/Dairy Council of the Upper Midwest and Midland Dairy Association merged to form the Midwest Dairy Association.

National Fluid Milk Processor Promotion Board Oversight

NOMINATIONS AND APPOINTMENTS

The 20 members of the Fluid Milk Board serve 3-year terms, with no member serving more than two consecutive terms. Fluid Milk Board members who fill vacancies with a term of 18 months or less are permitted to serve two additional 3-year terms. Fluid Milk Board members are selected by the Secretary from nominations submitted by fluid milk processors, interested parties, and eligible organizations. In a news release issued on May 14, 2001, the Secretary of Agriculture announced five new appointments

and two reappointments to the Fluid Milk Board. Newly appointed members were: Peter M. Ross, Franklin, Massachusetts (Region 1); Mary F. Williams, Athens, Tennessee (Region 4); Rachel Kyllo, Minneapolis, Minnesota (Region 7); John Robinson, Dallas, Texas (Region 10); and James T. Wilcox III, Roy, Washington (Region 13). Reappointed to serve second terms were: Ann Puelz Ocana, Phoenix, Arizona (At-Large); and Joseph W. Van Treeck, Anchorage, Alaska (At-Large Public Member). The newly appointed and reappointed members were seated at the July 12-14, 2001, Fluid Milk Board meeting.

A list of current Fluid Milk Board members appears in **Appendix A-2**. **Appendix B-2** shows a map depicting the 15 geographic regions under the Fluid Milk Promotion Order (Fluid Milk Order).

ORDER AMENDMENTS

A document announcing amendments to the Fluid Milk Order was published in the June 6, 2000, *Federal Register* (65 FR 35808). The amended Order, which became effective June 7, 2000, modified the establishment and membership provisions. The amendments allow a fluid milk processor to be represented by up to three members on the 20-person Board. The amendments also permit a Board member whose fluid milk processor company affiliation changes to serve on the Board for a period of up to six months or until a successor is appointed, whichever is sooner, provided the eligibility requirements of the Order are met. The amendments help to ensure Board continuity and full representation, and allows the Board to operate in an effective and efficient manner.

PROGRAM DEVELOPMENT

The Fluid Milk Board contracted with the International Dairy Foods Association (IDFA) to manage the program. IDFA contracted with Bozell Worldwide, Inc., Bozell Public Relations, and Marketing Drive Worldwide, Inc. (formerly McCracken Brooks Communications, Inc.), to develop the Fluid Milk Board's advertising, consumer education/public relations, and promotion programs, respectively.

CONTRACTOR AUDITS

The Fluid Milk Board retained the certified public accounting firm of Synder, Cohn, Collyer, Hamilton & Associates P.C., to audit the records of IDFA to determine if the operating expenses charged by the contractor for the period of July 1, 1998, through December 31, 1999, were in compliance with the conditions of their agreement with the Board. Results of the audit were favorable with no major inconsistencies identified. The Board continues to improve its internal contract control system to ensure that the amounts invoiced to the Board are in compliance with established contracts and procedures.

COMPLIANCE

Compliance by fluid milk processors in filing reports and remitting assessments continues in a timely manner and at a high rate. During this fiscal period, there have been no new cases of delinquent accounts referred to USDA.

CHAPTER 3

IMPACT OF GENERIC FLUID MILK AND DAIRY ADVERTISING ON DAIRY MARKETS: AN INDEPENDENT ANALYSIS

The Dairy Production and Stabilization Act of 1983 (Dairy Act; 7 U.S.C. 4514) and the Fluid Milk Promotion Act of 1990 (Fluid Milk Act; 7 U.S.C. 6407) require a yearly independent analysis of the effectiveness of milk industry promotion programs. These promotion programs operate to increase milk awareness and thus the sale of fluid milk and related dairy products. From 1988 to 1994, the U.S. Department of Agriculture (USDA) was responsible for the independent evaluation of the Dairy Program, as authorized by the Dairy Act and issued an annual report to Congress on the effectiveness of the Dairy Program. Beginning in 1995, the Congressional report began including third-party analyses of the effectiveness of the Dairy Program in conjunction with the Fluid Milk Program authorized by the Fluid Act.

For the past three years, the evaluation has been conducted by economists from Cornell University. The economic model used last year was used in the present study, except the data were updated to include observations through 2000. The model used is unique in its level of disaggregation. For instance, the dairy industry is divided into retail, wholesale (processing), and farm markets, and the retail and wholesale markets include fluid milk and cheese separately. The model simulates market conditions with and without the Dairy and Fluid Milk Programs.

In addition to the market-wide analysis, this year's study also includes an examination of the impact of advertising under the two programs on individual household consumption of

specific fluid milk and cheese products. Based on a massive household data set on fluid milk and cheese product purchases obtained from A.C. Nielsen, Inc., an econometric model was developed to measure the impact of generic cheese and fluid milk advertising on eight dairy products. The use of household-level data and the estimation procedure employed allow the total effect of generic advertising to be decomposed into its extensive (frequency of purchase) and intensive (level of consumption) components. The following summarizes the findings of the report. Copies of the complete Cornell evaluation report may be obtained from Cornell University, USDA, the National Dairy Promotion and Research Board, or the National Fluid Milk Processor Promotion Board.

HIGHLIGHTS

Generic fluid milk and dairy product advertising conducted under the Dairy and Fluid Programs had a major impact on dairy market conditions. Over the period 1996-2000, on average, the following market impacts would have occurred if the two promotion programs had not been in effect:

- Fluid milk consumption would have been 2.6 percent lower.
- Cheese consumption would have been 1.2 percent lower.
- Total consumption of milk in all dairy products would have been 1.4 percent lower, or roughly 2.2 billion pounds of milk on a butterfat equivalent basis.

- The average price received by dairy farmers would have been 9.8 percent, or $1.17 per hundredweight lower.
- Commercial milk marketings by farmers would have been 0.8 percent lower.

Over the same period, the following market impacts would have occurred if the Dairy Program had not been in existence (assuming the Fluid Program was in effect):

- Fluid milk consumption would have been 1.1 percent lower.
- Cheese consumption would have been 1.4 percent lower.
- Total milk consumption would have been 0.9 percent lower, or roughly 1.5 billion pounds of milk on a butterfat equivalent basis.
- The average price received by dairy farmers would have been 5.6 percent, or $0.78 per hundredweight lower.
- Commercial milk marketings by farmers would have been 0.4 percent lower.
- The average benefit-cost ratio (BCR) for the Dairy Program was 4.47.

FACTORS AFFECTING THE DEMAND FOR FLUID MILK AND CHEESE

Because there are many factors that influence the demand for fluid milk and cheese besides advertising, an econometric model was used to

identify the effects of individual factors affecting the demand for these two products. The following variables were included as factors influencing per capita fluid milk demand: the Consumer Price Index (CPI) for fluid milk; the CPI for non-alcoholic beverages, which was used as a proxy for fluid milk substitutes; per capita disposable income; percent of U.S. population under six years old; variables to capture seasonality in fluid milk demand; a trend variable to capture changes in consumer tastes towards fluid milk over time; expenditures on brand fluid milk advertising; and expenditure on generic fluid milk advertising.

The following variables were included as factors influencing per capita cheese demand: the CPI for cheese; the CPI for meat, which was used as a proxy for cheese substitutes; per capita disposable income; variables to capture seasonality in cheese demand; a trend variable to capture changes in consumer tastes towards cheese over time; expenditures on brand cheese advertising; and expenditures on generic cheese advertising.

The model was estimated with national quarterly data from 1975 through 2000. To account for the impact of inflation, all prices and income were deflated. Brand and generic fluid milk and cheese advertising expenditures were deflated by the Media Cost Index. Because advertising has a carry-over effect on demand, past advertising expenditures also were included in the model as explanatory variables.

The relative impacts of variables affecting demand can be represented with what economists call "elasticities," which measure the percentage change in per capita demand given a 1 percent

change in one of the identified demand factors. **Table 3-1** presents the estimated elasticity values for primary demand factors for fluid milk and cheese. For example, the income elasticity of demand for fluid milk equal to 0.13 means that a one-percent increase in per capita income increases per capita fluid milk demand by 0.13 percent.

The most important factor affecting per capita fluid milk demand is the percentage of population under six years old. As **Table 3-1** illustrates, after peaking in 1993, the percentage of population under six years old has steadily declined, which has had a large negative effect on per capita fluid milk demand since younger children consume a larger share of fluid milk than older segments of the population. It is clear from **Table 3-1** that per capita milk demand has followed a similar pattern to the change in the proportion of the U.S. population under six years old. The most important factor affecting per capita cheese demand is the retail price of cheese. The results indicate that for a one-percent reduction in the retail prices of cheese, per capita quantity demanded would increase by almost 0.4 percent.

The elasticity of generic advertising for fluid milk was 0.045. This means that for each one-percent increase in expenditures for generic fluid milk advertising, fluid milk consumption would be expected to increase 0.045 percent. The elasticity of generic advertising for cheese was also positive, but at 0.019, was almost 2.5 times smaller in magnitude than the generic elasticity for advertising of fluid milk. One reason why generic fluid milk advertising may be more effective in increasing demand than generic cheese advertising

is that fluid milk is a much more homogeneous product than cheese.

It is hypothesized that advertising of pizza and cheeseburgers has a positive effect on the consumption of cheese. Such variables were not included in the model due to a lack of data. Assuming pizza and cheeseburger advertising has a significantly positive effect on cheese consumption, omission of these variables would result in the impact of generic cheese advertising being overstated.

IMPACT OF THE DAIRY AND FLUID MILK PROGRAMS

The market impacts of the Dairy and Fluid Programs were examined over the time period 1996-2000. These two programs are complementary in that they both share a common objective to increase fluid milk sales. To do this, both programs invest in generic fluid milk advertising, which is different from brand advertising in that the goal is to increase the total market for fluid milk rather than a specific brand's market share. In the evaluation of the programs, it is assumed that a dollar spent on fluid milk advertising by dairy farmers has the same effect on demand as a dollar spent by processors on fluid milk advertising, since both programs have an identical objective. The Dairy Program additionally has an objective to expand the market for cheese. Accordingly, part of its budget is directed to generic cheese advertising. To examine the impacts that the two programs had on the markets for fluid milk and cheese over this period, the economic model was simulated under two scenarios based on the level of generic advertising expenditures:

(1) a baseline scenario, where generic advertising levels were equal to actual generic advertising expenditures under the two programs, and (2) a no-national program scenario, where there was no fluid milk processor nor dairy farmer advertising program. A comparison of these two scenarios provides a measure of the combined impacts of the two programs.

Table 3-2 presents the annual averages for supply, demand, and price variables over the period 1996-2000 for the two scenarios. Generic advertising by the Dairy and Fluid Programs has had a positive impact on fluid milk consumption over this period. Specifically, fluid milk consumption would have been 2.6 percent lower had the two programs not been in effect. Likewise, generic cheese advertising under the Dairy Program had a positive impact on cheese consumption, i.e., consumption would have been 1.2 percent lower without generic advertising. Consumption of milk used in all dairy products would have been 1.4 percent lower had these two programs not been in effect during 1996-2000.

Generic advertising by dairy farmers and milk processors also had an effect on the farm milk price and milk marketings. The simulation results indicate that the all-milk price would have been $1.38 per hundredweight lower without the generic advertising provided under the two programs. The farm milk price impacts resulted in a slight increase in farm milk marketings. That is, had there not been the two advertising programs, farm milk marketings would have been 0.8 percent lower over the 1996-2000 period due to the lower milk price.

A third scenario was simulated to measure the market impacts of the advertising program supported by the 15-cent checkoff program by dairy farmers. This scenario assumes that the only advertising program in effect is the one operated by the milk processors. A comparison of this scenario with the baseline gives a measure of the market impacts of the 15-cent dairy producer program.

The last two columns of **Table 3-2** present the results of this scenario, and the results are similar to the combined fluid milk processor and dairy farmer advertising program results. Had there not been fluid milk and cheese advertising sponsored by dairy farmers, fluid milk demand would have been 1.1 percent lower, cheese demand would have been 1.4 percent lower, and total milk demand would have been 0.9 percent lower than it actually was. Advertising under the Dairy Program also had a significant impact on the farmer milk price. The simulation results indicate that the all-milk price would have been $0.78 per hundredweight lower without generic advertising by the Dairy Program. Finally, farm milk marketings would have been slightly lower (0.4 percent) in the absence of the Dairy Program.

BENEFIT-COST OF THE DAIRY PROGRAM

One way to measure whether the benefits of a program outweigh the cost is to compute a benefit-cost ratio (BCR). A BCR can be computed as the change in net revenue due to advertising divided by the cost of advertising. While a BCR can be estimated for the Dairy Program, it cannot be computed at this time for the Fluid Program because data on packaged fluid milk wholesale

prices, which is necessary in calculating processor net revenue, are proprietary information and not available.

The BCR for the Dairy Program was calculated as the change in dairy farmer net revenue due to the existence of the Dairy Program divided by the costs of the Dairy Program. The cost of the Dairy Program was measured as the 15 cents per hundredweight assessment. The results show that the average BCR for the Dairy Program was 4.47 from 1996 through 2000. This means that each dollar invested in generic fluid milk and cheese advertising by dairy farmers during the period returned $4.47, on average, in net revenue to farmers.

Another way to interpret this figure is as follows. On average over the period 1996-2000, the Dairy Program cost dairy producers $239.4 million per year. The fluid milk and cheese advertising invested from the Dairy Program resulted in higher milk demand, milk prices, and profits for dairy producers nationwide. Based on the simulations conducted with the economic model, it is estimated that the average annual increase in net revenue due to advertising under the Diary Program was $1.07 billion, which represents 4 percent of total farm cash receipts from milk marketings. Dividing $1.07 billion by the total checkoff program cost of $239.4 million results in the benefit cost estimate of 4.47.

HOUSEHOLD-LEVEL ANALYSIS OF THE TWO PROGRAMS

The impacts of advertising by the Fluid and Dairy Programs also were analyzed utilizing

household-level purchase data. Specifically, at-home demand functions for fluid milk and cheese products were estimated based on a model that decomposes fluid milk and cheese purchases into two components: (1) frequency of purchase (i.e., how often the household purchases), and (2) intensity of purchases (i.e., the quantity purchased). The use of household-level data and the estimation procedure employed allows the decomposition of the total effect of generic advertising on its extensive (frequency of purchase) and intensive (level of consumption) components. This is particularly important when evaluating advertising programs to determine to whom the message has been successfully delivered, new or current consumers.

Fluid milk and cheese purchase data for at-home consumption and annual household demographic data were obtained from the AC Nielsen Homescan Panel sample of U.S. households from January 1996 through December 1999. The dairy product purchase data is purchase-occasion data where households use hand-held scanners to record food purchase information including date of purchase, UPC code, total expenditure, and quantities purchased. Along with this, sample households submit annual demographic information.

Approximately 20,000 households were included in the estimation of the fluid milk and cheese product demand equations. National generic fluid milk and cheese advertising expenditures were merged with the household data. Since advertising expenditures are national, it is assumed that each household in the sample received the same exposure to generic advertising over time.

Fluid milk was disaggregated into four subcategories: whole, reduced fat (2%), light (0.5%-1%), and skim milk. Reduced fat milk was the most common milk product, followed by skim and then whole and light milk. Cheese was disaggregated into American, Mozzarella, Processed, and Other cheese categories. The Other cheese category contains numerous varieties, including Ricotta, Muenster, Farmers, brick, and cream cheese. Processed cheese had the highest average consumption, followed by Other and American cheese, while Mozzarella was a distant fourth.

Net price, household income, household size, and generic advertising are the basic exogenous variables included in the demand models. To account for price variation due solely to volume and store discounts, variables that reflect the proportion of purchases in various package sizes and store types were included. Differences in household composition are accounted for with variables reflecting age of the household head, whether mom works outside of the home, and the proportion of family members by age classification. The demand models also control for race, education, geographic location, and seasonality.

While the market-wide, total commercial disappearance economic model is entirely different and uses a different data set than the household model, it is interesting that price and advertising elasticities are quite similar, which can be seen by comparing the results presented in **Tables 3-1 and 3-3**. For example, the total price elasticities calculated from the household data for total milk and total cheese were -0.173 and -0.341, respectively, which is nearly identical to those calculated with aggregate market-level data presented in Table 1 (-0.160 and -0.373). As expected, the

total advertising elasticities for total milk and cheese were slightly higher than those reported earlier, but this is due to the use of data for at-home consumption only. That is, since advertising focuses on at-home consumption, one would expect the advertising elasticities to be higher in the at-home demand model than in the total commercial disappearance demand model that includes away-from-home consumption as well. Interestingly, the same result holds as before regarding the fluid milk advertising elasticity being about three times larger than the cheese advertising elasticity (0.081 for all fluid milk products vs. 0.024 for all cheese products).

Since the focus is on the decomposition of the extensive and intensive effects on total demand (particularly for advertising), attention is directed to the computation of the corresponding elasticities. The frequency of purchase elasticity represents the percentage change in frequency of purchase for a 1% change in the selected variable (i.e. the extensive effect), while the intensive elasticity represents the percentage change in the quantity demanded, given a purchase occasion, for a 1% change in the selected-variable (i.e. the intensive effect). The total elasticity represents the sum of the extensive and intensive effects.

Long-run generic advertising elasticities were positive and significant for all fluid milk products. The generic advertising message appears to have a predominantly intensive effect on fluid milk demand. For total fluid milk, the total long-run advertising elasticity was 0.081, 88% of which can be attributed to increasing the amount of purchase per purchase occasion, while only

12% can be attributed to increasing the frequency of households to purchase. This is consistent across all categories, with the largest relative response from the generic campaign shown for reduced fat (0.081) and skim milk (0.082), followed closely by whole (0.074) and light milk (0.072). Whether the results would be similar from a more differentiated campaign with respect to fat content is an empirical question and cannot be gleaned from these results; however, the relative similarity in response across all products seems consistent with the generic advertising message.

While positive and significant in the total cheese category, the effectiveness of the generic cheese advertising campaign appears lower than that estimated for fluid milk. The total cheese advertising elasticity was estimated to be 0.024; however, the entire amount of this was realized from the extensive margin. That is, cheese advertising appears to be effective at increasing the frequency of purchase, but has no significant effect on increasing the amount of purchase per purchase occasion. This is consistent across all cheese products in which no intensive demand elasticities were significantly different from zero. The largest contributors to the total cheese result were from Other cheese (0.069) and American cheese (0.063), while the Processed (0.021) and Mozzarella (0.021) advertising elasticities were more similar in magnitude to that of the aggregate product. It is interesting that while both programs are generic and do not target any specific products, the individual product advertising elasticities are more variable for the relatively differentiated cheese products, but are much

more similar for the relatively homogeneous fluid milk products.

From the wide disparity in extensive versus intensive advertising response, it is clear that the fluid milk and cheese generic advertising campaigns are inducing response from different types of consumers. While fluid milk advertising seems most effective at increasing the amount of purchases per purchase occasion, its effect on purchase frequency is less pronounced. Conversely, the effect that cheese advertising has had on total household demand is clearly from increasing the frequency of purchase by U.S. household, not from increasing the level of purchases per purchase occasion. Information such as this provides valuable information to dairy product marketers in determining where past efforts have been most effective and in developing future advertising strategies with respect to their target audience.

Table 3-1. Estimated elasticity values for factors affecting the retail demand for fluid milk and cheese.[a]

Factors Affecting Demand	Fluid Milk	Cheese
Retail price	-0.160	-0.373
Per capita income	0.130	0.200
Brand advertising	0.009	0.020
Generic advertising	0.045	0.019
Percent of population younger than six years old	0.530	n.a.*

[a] Example: A 1 percent increase in the retail price of fluid milk is estimated to reduce per capita sales of fluid milk by 0.16 percent.
See **Table 3-4** for variable sources, means and standard deviations.
* n.a. means "not applicable."

Table 3-2. Simulated annual average impacts of the Dairy and Fluid Milk Programs on selected market variables, 1996-2000.

Market Variable	Unit	Baseline Scenario[a]	No-National Program Scenario[b]	Percent Difference	No-Dairy Program Scenairo[c]	Percent Difference
Fluid milk demand	bil lbs	55.3	53.9	-2.6	54.7	-1.1
Cheese demand	bil lbs, ME butterfat basis[e]	65.5	64.8	-1.2	64.6	-1.4
Total dairy demand	bil lbs	161.4	159.2	-1.4	159.9	-0.9
All milk price	$/cwt	14.07	12.69	-9.8	13.29	-0.4
Milk marketings	bil lbs	159.6	158.3	-0.8	159	-0.4
Benefit-cost ratio[d]	$ per $1	—	—	—	4.47	—

[a] The baseline scenario reflects the operation of the Dairy and Fluid Milk Programs.
[b] The no-national-program scenario assumes there is no generic advertising for fluid milk and cheese.
[c] The no-Dairy Program scenario assumes there is no generic advertising for fluid milk and cheese by dairy farmers, but there is fluid milk advertising by milk processors.
[d] The BCR for the Dairy Program only.
[e] ME = Milkfat Equivalent

Table 3-3. Price and long-run advertising elasticities for milk and cheese products. [1]

Variable	Price			Advertising		
	Frequency	Intensive	Total	Frequency	Intensive	Total
Total Milk	-0.037 *	-0.136 *	-0.173 *	0.010 *	0.071 *	0.081 *
Whole	-0.605 *	-0.167 *	-0.772 *	0.011 *	0.063 *	0.074 *
Reduced Fat	-0.529 *	-0.128 *	-0.657 *	0.009 *	0.073 *	0.081 *
Light	-0.563 *	0.027	-0.535 *	0.014 *	0.058 *	0.072 *
Skim	-0.522 *	-0.007	-0.529 *	0.016 *	0.066 *	0.082 *
Total Cheese	-0.157 *	-0.184 *	-0.341 *	0.023 *	0.000	0.024 *
American	-1.027 *	-0.221 *	-1.248 *	0.062 *	0.001	0.063 *
Mozzarella	-1.235 *	-0.342 *	-1.577 *	0.025 *	-0.004	0.021 *
Processed	-0.500 *	-0.113 *	-0.613 *	0.024 *	-0.003	0.021 *
Other Cheese	-0.438 *	-0.289 *	-0.726 *	0.067 *	0.002	0.069 *

[1] Evaluated at sample means.

* Significance at the 1% level.

Table 3-4. Source and Descriptive Statistics for Fluid Milk and Cheese Demand Data used in Econometric Model

Variable	Average	Stan. Dev	Source
Retail milk price index (1982-84=100)	111.8	25.6	US Department of Labor, Bureau of Labor Statistics 1975-00. *Consumer Price Index*, Washington, D.C.
Retail cheese price index (1982-84=100)	113.2	30.4	US Department of Labor, Bureau of Labor Statistics 1975-00. *Consumer Price Index*, Washington, D.C.
Retail nonalcoholic beverage price index (1982-84=100)	105.1	24.4	US Department of Labor, Bureau of Labor Statistics 1975-00. *Consumer Price Index*, Washington, D.C.
Retail meat price index (1982-84=100)	113.6	27.1	US Department of Labor, Bureau of Labor Statistics 1975-00. *Consumer Price Index*, Washington, D.C.
Civilian population (mil)	245.2	17.8	US Printing Office. 1975-00. *Economic Report of the President*. Washington, D.C.
Disposable income (bil $)	3,701	1,754	US Department of Labor, Bureau of Labor Statistics 1975-00. *Employment and Earnings*, Washington, D.C.
Consumer price index (1982-84=100)	116.4	36.1	US Department of Labor, Bureau of Labor Statistics 1975-00. *Consumer Price Index*, Washington, D.C.
Percent of population younger than six years old (%)	7.32	2.2	US Printing Office 1975-00. *Economic Report of the President*. Washington, D.C.
Deflated generic milk advertising expenditures ($1,000)	4,770	2,880	Leading National Advertisers, Inc. 1975-00. *AD & Summary*. New York.
Deflated brand milk advertising expenditures ($1,000)	821	479	Leading National Advertisers, Inc. 1975-00. *AD & Summary*. New York.
Deflated generic cheese advertising expenditures ($1,000)	2,227	1,534	Leading National Advertisers, Inc. 1975-00. *AD & Summary*. New York.
Deflated brand cheese advertising expenditures ($1,000)	6,970	2,444	Leading National Advertisers, Inc. 1975-00. *AD & Summary*. New York.

CHAPTER 4

FLUID MILK MARKET AND PROMOTION ASSESSMENT

For the second consecutive year, Beverage Marketing Corporation (BMC) has been commissioned to review the fluid milk advertising and promotional programs. This review offers a subjective evaluation of the effectiveness of those programs. To accomplish this review, BMC first evaluated milk programs relative to milk's competitive beverage set. BMC believes milk's competitive set includes most non-alcoholic refreshment beverages, specifically carbonated soft drinks, bottled water, fruit beverages, ready-to-drink teas and sports beverages. This year BMC was able to reconstruct milk's performance relative to its competitive set between 1985 and 2000. Milk's performance, in the form of indexed share of competitive set annual volume turnover, provides an additional quantitative measure for judging advertising and promotional effectiveness. The following summarizes the report.

BMC'S ASSESSMENT OF CURRENT MILK INDUSTRY ENVIRONMENT

Total fluid milk volume has increased for two consecutive years, even surpassing the growth rate of carbonated soft drinks in 2000. BMC believes these increases reflect the growing cumulative value of the generic fluid milk programs, which have been in effect since 1995.

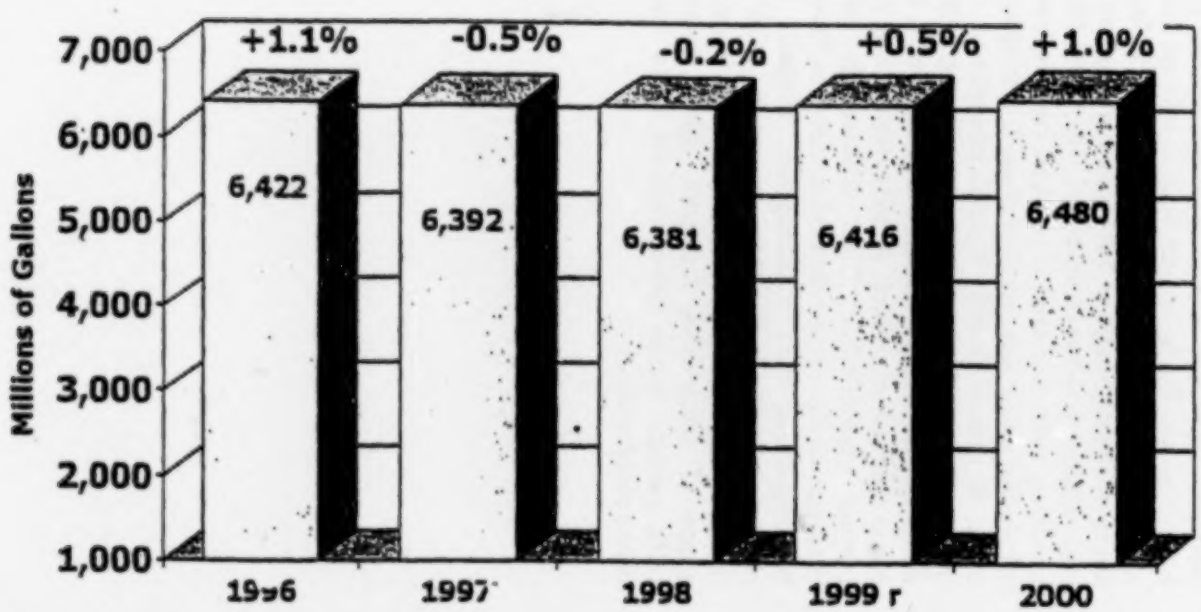
Milk's compound annual growth rate (CAGR) was 0.2% from 1996 to 2000. The total competitive set, including milk, grew at a CAGR of 2.7% from 1996 to 2000. Milk, while still losing share to the competitive beverage set, has been steadily increasing its share of competitive turnover for

four of the last five years. Without milk, the competitive set would have risen at a CAGR of 3.7% in the same period. Within the competitive set, bottled water has been the star performer; it is interesting to note that the competitive set would have grown at a CAGR of just 1.6% from 1996 to 2000 excluding bottled water. In 2000, fluid milk continued to show signs of a rebound and demonstrated a one-year volume growth of 1.0% over 1999. This growth is in gallons of fluid milk (as opposed to pounds), and is calculated using scanner data from information Resources and other sources. Growth in 1999 was 0.5%. (USDA fluid milk sales data report a -0.4% decline 2000 and a +0.7% increase in 1999.)

The history of volume changes for fluid milk consumption over the past five years is shown in **Figure 1**. It appears that the strong marketing campaign under the Dairy Production and Stabilization Act of 1983 (Dairy Act) and the Fluid Milk Promotion Act of 1990 (Fluid Milk Act) has stemmed the years of volume losses that milk has endured. In addition, the competitive environment for milk is more challenging than ever today with an ever-increasing array of competitive products available to consumers.

This year's review includes an analysis of milk's annual share of the volume increase experienced by the entire competitive set over the past 15 years. The measure of milk's performance is its indexed share of competitive volume change, divided by milk's market share of the competitive set at the beginning of the year. When this index is greater than 1, milk is improving its share. When less than 1, milk's share of the competitive set is declining. The data from 1986 to 2000 are shown in **Figure 2.**

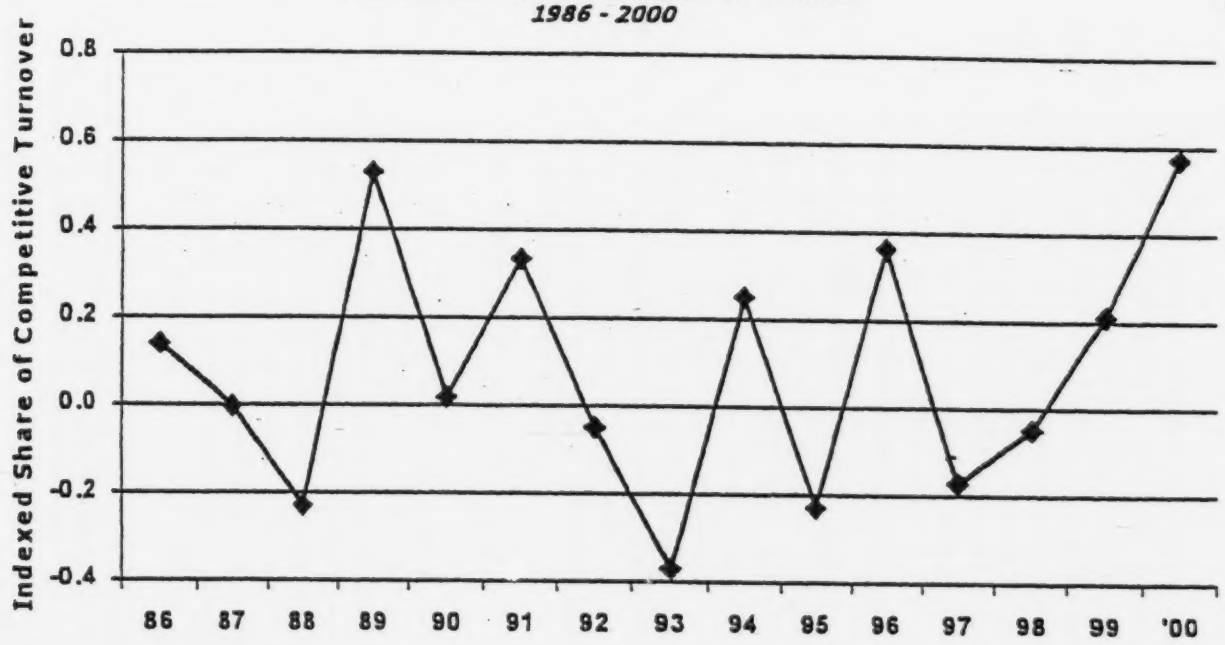
Figure 1:
Fluid Milk Volume and Growth
1996 - 2000



r=revised
Source: Beverage Marketing Corporation

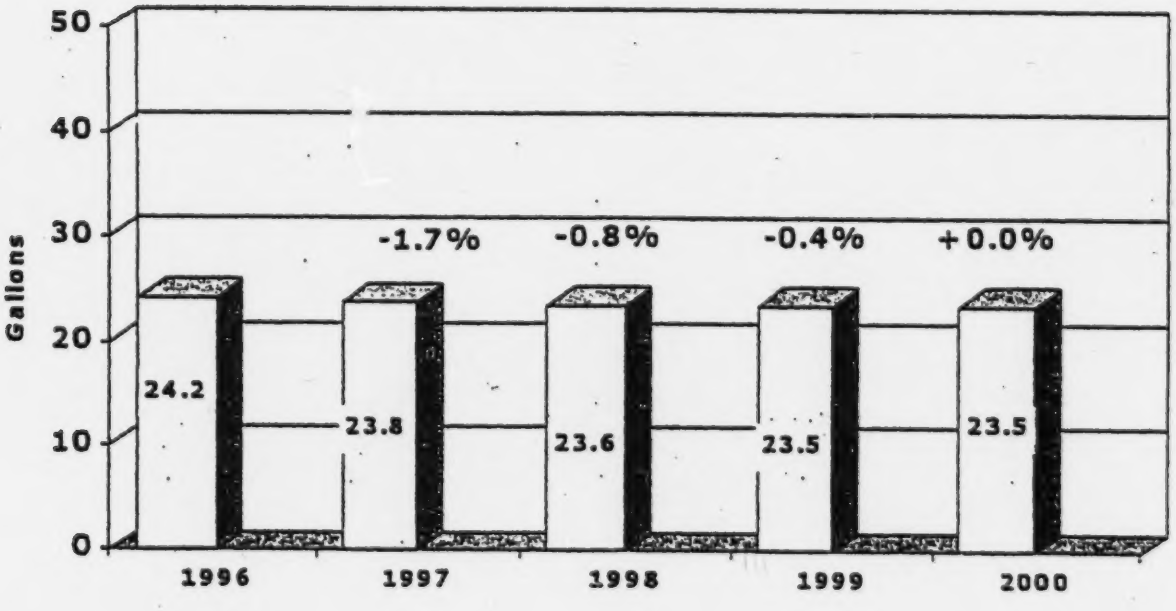
Between 1986 and 1995, as milk's overall performance was declining on both a volume basis and per capita consumption basis, its indexed share of the competitive turnover varied more or less randomly between -0.4 and 0.6. Since 1995, however, milk has shown marked improvement. While the index remains less than 1, the upward trend is unmistakable. Annual changes in the index can be due to many factors, but in BMC's analysis, the only identifiable and consistent factor is the abrupt uptick in advertising and promotion expenditures. This observation lends credence to the notion that advertising is favorably impacting milk consumption. Without the advertising and promotion program, milk is likely to have continued its random variation in share of competitive turnover. BMC believes milk volume would have declined more under those circumstances.

Figure 2:
Milk Indexed Share of Competitive Turnover
1986 - 2000



Source: Beverage Marketing Corporation

Figure 3:
Fluid Milk Per Capita Sales In Gallons
1996 - 2000



Source: Beverage Marketing Corporation

BMC data reveals that per capita milk volume as shown in **Figure 3** is virtually unchanged in 2000 after a three-year slide. While this data is not consistent with USDA fluid milk sales data in measured pounds, it is consistent with scanner data measuring sales of fluid milk through key retail channels. BMC believes this turnaround is the result of the cumulative effect of approximately six years of well designed and executed generic advertising and promotion programs.

In the absence of substantial branded advertising, BMC believes this generic campaign has been very successful. Ultimately, branded advertising is needed to make the category more competitive in the beverage marketplace because brands are more effective at cuing consumer purchases. Nevertheless, milk as a product has some other disadvantages, which also must be addressed, including limited product innovation and convenience packaging.

Milk's challenge of continued growth is all the more complicated by the fact that competitive products have usurped milk's positioning as the ultimate healthy beverage. For example, many beverages are now formulated with calcium like orange juice, and a wide array of products is perceived to be healthy, such as bottled waters and teas. In fact, bottled water is likely to eclipse milk (as well as coffee and beer) to have the second highest per capita consumption after carbonated soft drinks by 2004. See **Figure 4.**

As discussed in last year's report, BMC continues to believe milk's mixed performance is attributable to limitations in six key areas:

Consumer attention

- An ever-increasing array of products competes for the attention of the consumer. Some of them have co-opted milk's product attributes, such as a source of calcium.

Product attributes

- While milk has begun to innovate, it lags almost every other category in the competitive set in this respect.
- Milk still offers limited new products and flavors as well as usage occasions.

Figure 4:
Per Capita Consumption and Change
(Gallons)
1999-2000

Category	1999	2000	% Change
CSD	55.9	55.7	-0.4
Bottled Water	15.6	18.2	16.7
Milk	23.5	23.5	0.0
Fruit Beverages	15.2	15.2	0.0
Sports Drinks	2.3	2.5	8.7
RTD Tea	1.9	1.8	-5.3

Source: Beverage Marketing Corporation

Branding

- Milk lacks well-developed brands and the competitive set is dominated by many large brands.
- More than half of milk volume is private label and just a fraction of the competitive set is accounted for by private label.

Distribution

- Milk has begun to make inroads in the fast-growing immediate consumption channels, but still has room to improve.
- Product perishability continues to limit promotion, display and impulse sales.

Marketing Effectiveness

- Strides have been made in the coordination and alignment between the national program developers, processors, and retailers over the last year, but there remains an opportunity for further improvement.

Pricing

- Milk rarely uses price promotion, while the rest of the competitive set uses it to encourage stock-up. Again, milk's perishability is limiting because it reduces the likelihood of stock-up.

BMC'S ASSESSMENT OF CURRENT MILK MARKETING PROGRAMS

Beverage Marketing Corporation believes and the available evidence suggests that the fluid milk advertising and promotion programs continue to achieve the primary goal of increasing fluid milk consumption. This achievement of improved consumption in the face of substantially more intense beverage competition suggests that milk's advertising and promotional activities are pushing the right buttons with consumers.

Fine tuning of the program over the last year has begun to effectively address the issues of

program efficiency that BMC raised in 2000. While still effective, the milk programs are in need of some strategic re-thinking to move the messaging to higher order consumer benefits as competitors begin to piggy-back on the nutritional proposition (mainly calcium) supported by the milk program.

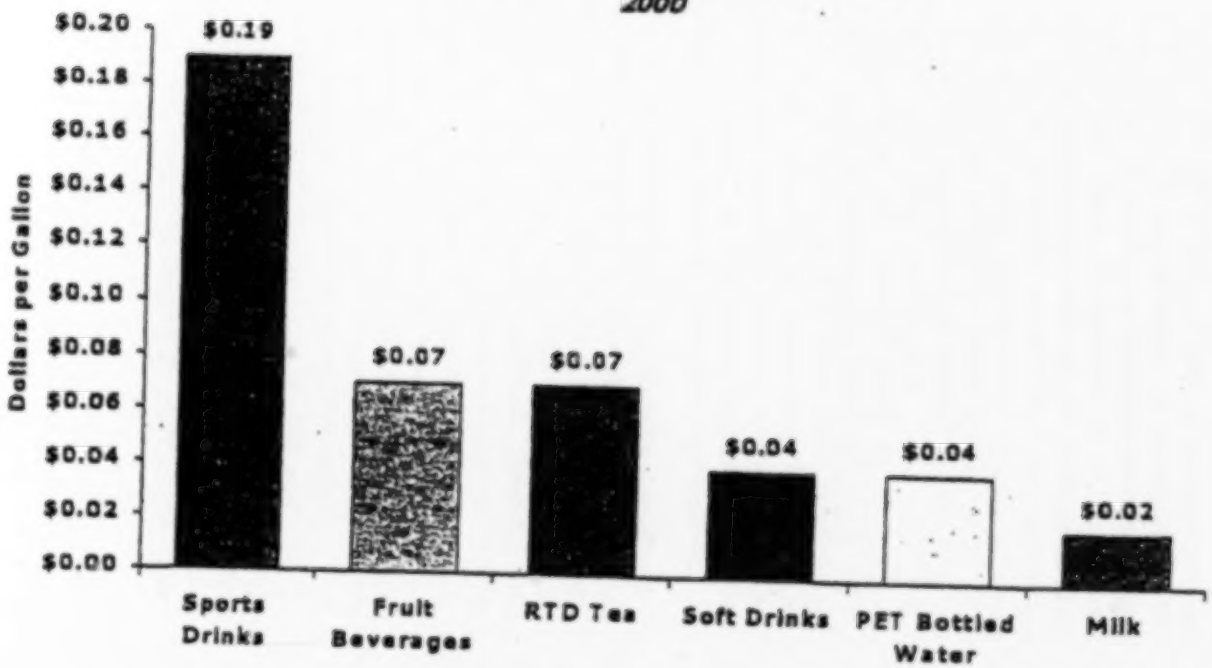
The Cornell University econometric model (see Chapter 3) continues to demonstrate that the advertising program helps. The latest, more detailed econometric model produces significant positive advertising elasticities (.081) for fluid milk. The model reveals that milk advertising has been effective in increasing consumption among existing users, but somewhat less effective at bringing in new users. This may mean the impact of the campaign is beginning to soften.

The milk industry has successfully developed a targeted, integrated marketing program that is by all available measures a success. The campaign has particularly high awareness levels. Perhaps the program's greatest strength has been its memorable, award-winning advertisements and "got milk?®" tagline. In addition, this campaign has featured a wide collection of endorsements from a very diverse group of celebrities – from popular actors and professional athletes to cartoon characters. Not only has this helped to contemporarize milk, but also the diversity of celebrities has given the campaign broad appeal across many demographic groups. The messaging mix between primarily print and broadcast media continues to add to the effectiveness of the campaign.

This has been achieved in the face of greater spending by all of the other beverages in milk's

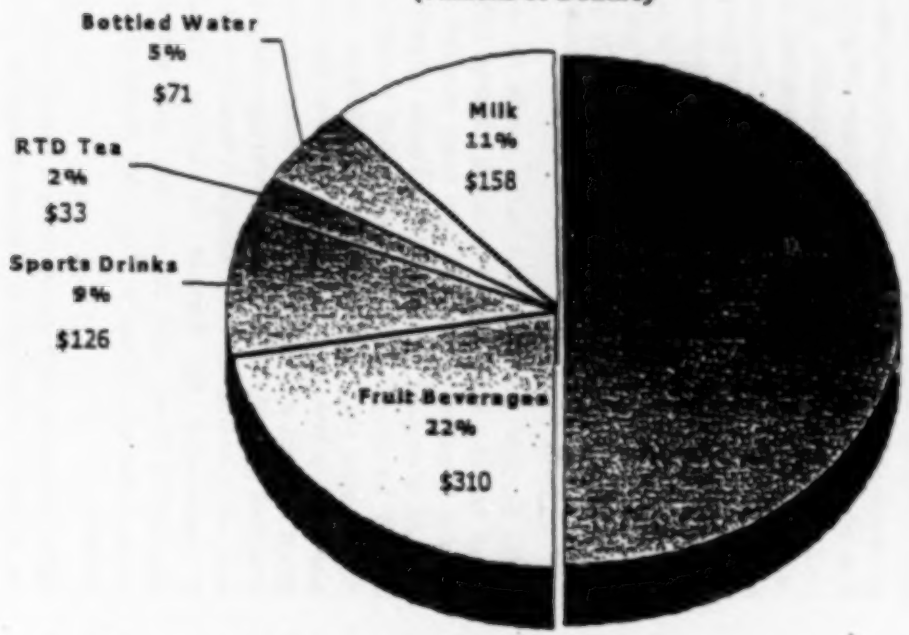
competitive set. Furthermore, milk's share of voice in measured media declined in 2000 over 1999. Within the competitive set, sports drinks spent the most per gallon, while milk spent the least. Overall, carbonated soft drinks spend the most on advertising, but cents per gallon spending is relatively low due to the great volume of products sold and consumed as shown in **Figure 5.** In 1999, bottled water spent the least per gallon advertising, but increased network TV advertising in 2000, surpassing milk. In total, carbonated soft drinks account for about half of all ad spending of the competitive set. See **Figure 6.**

Figure 5:
Competitive Set Ad Spending per Gallon
2000



Source: Beverage Marketing Corporation; Competitive Media Reporting

Figure 6:
Ad Spending by Category
2000
(Millions of Dollars)



Source: Beverage Marketing Corporation; Competitive Media Reporting

BMC believes the milk program's greatest weakness may be the need to evolve advertising messaging from functional/nutritional to higher order consumer needs states and emotional benefits. While the nutritional positioning is strong, it is primarily based on functional benefits. The calcium benefit is no longer a strong point of differentiation from the competitive set. Competitive branded products almost entirely utilize higher-order consumer need states in their advertising to impart, for example, messages of self esteem, well being, and confidence. These kinds of messages are rarely imparted in generic advertising campaigns.

BMC further believes that milk needs to continue to fine-tune its advertising demographic mix to greater emphasize the teen market as well as emerging ethnic groups. Youth targeting should be in all venues where that consumer shops, and should complement a renewed emphasis in school programs. One problem the program can not address alone is the need for more branded advertising. Milk is a beverage category, and not a brand. Thus its image is mostly that of a commodity. By further developing brands, marketing them, and innovating, milk can become more appealing to a broader range of consumers.

BMC believes milk must remain competitive in its share of voice with the other categories in its competitive set. While increased spending does not always translate into increased sales, milk must be cognizant of the superior spending of much of its competitive set. The cumulative impact of ad spending disparities between milk and the competitive set can only put milk at a greater disadvantage over time. While milk accounts for

about 20% of the volume of the competitive set, it only accounts for about 11% of share of voice within the competitive set. Milk can make its dollars work harder and go farther by targeting its spending better focusing on the most important demographic sectors. Gross spending does not tell the entire story.

The spending disparity is even greater in promotional spending where carbonated soft drinks, for example, may spend as much as 10 times what milk spends on promotions. Total milk promotional spending levels should be significantly increased to match competitive share of voice.

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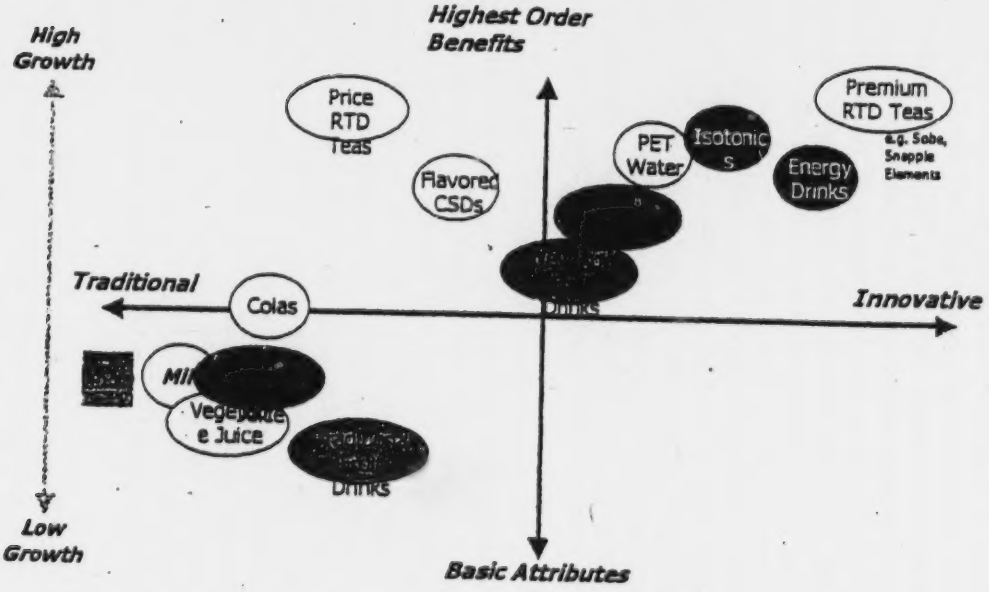
Figure 7:
Consumer Benefits Hierarchy vs. Level of Innovation



Source: Beverage Marketing Corporation

App. 98

Over the last year, milk has made strides in improving the alignment of marketing programs, but there is still room for improvement. Marketing programs should include all aspects of integrated marketing, i.e., positioning, packaging, pricing, availability, and public relations. The dairy industry needs to improve its field execution expertise, i.e., better merchandising, more innovative point-of-sale materials, and better dairy case management. While this is traditionally the role of processors, the industry could work to prepare sales and merchandising programs for dairy personnel in retail stores. Assistance could be offered in other areas, such as category management. Dairy processor certification programs could facilitate implementation.

Finally, BMC believes the real key to milk's future growth continues to be innovation. Innovation can come in new products, new packages, and new flavors, for example. Again, processors must take the lead here, but DMI/MilkPEP can help by increasing its focus on innovation research. Once developed, these new ideas could be offered to processors to further test and roll-out. Without the right products and packaging, the effectiveness of the milk industry's marketing programs is blunted. The most successful beverage products today are innovative and provide consumers with basic product attributes as well as higher order benefits. See **Figure 7.**

AGREEMENT

THIS AGREEMENT is made this 27th day of April 1994, by and between the NATIONAL DAIRY PROMOTION AND RESEARCH BOARD, an organization created under the Dairy Product Stabilization Act of 1983, located at 2111 Wilson Boulevard, Suite 600, Arlington, Virginia 22201 ("NDB"), and **UNITED DAIRY INDUSTRY ASSOCIATION**, an Illinois not-for profit corporation located at O'Hare International Center, 10255 West Higgins Road, Suite 900, Rosemont, Illinois 60018-5616 ("UDIA").

PREAMBLE

WHEREAS, the NDB is a national organization created under the Dairy Production Stabilization Act of 1983, 7 U.S.C. §§ 4501 *et seq.* (the "Act"), established for the purpose of "carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the market place and to expand domestic and foreign markets and uses for fluid milk and dairy products produced in the United States";

WHEREAS, UDIA is a membership corporation whose members are state and regional dairy promotion and research programs, with a purpose of increasing consumption of dairy products;

WHEREAS, both NDB and UDIA conduct programs and projects of research, promotion, education, and information designed to maintain and expand consumption of dairy products;

WHEREAS, both parties believe that by combining their efforts in the planning, origination, development,

contracting, funding, conduct and evaluation of such programs and projects, such programs and projects can be performed more efficiently and effectively; and

WHEREAS, the parties hereto desire to form a not-for-profit corporation on the terms set forth herein for the purpose of accomplishing the ends set forth herein,

NOW, THEREFORE, the parties hereto agree as follows:

1. *Creation of Corporation; Name*. The parties hereto shall form a corporation pursuant to the laws of the District of Columbia, to be known as Dairy Management, Inc. (the "Corporation").

2. *Purposes of the Corporation.*

A. The Corporation's purposes are:

(1) To implement joint programs and projects between NDB and UDIA;

(2) To provide funding, management, staff and other resources, and to plan, develop, and implement programs authorized under federal and state dairy check-off programs;

(3) To provide resources for program evaluation and market research to the NDB and UDIA;

(4) To manage benefit programs for employees of the Corporation, the parties, and related organizations;

(5) To implement specific NDB- and UDIA-funded programs; and

(6) To carry out the administrative, financial and management functions of NDB and UDIA and the Corporation.

B. *Limitation of Authority*. The Corporation will not engage in any business or devote itself to any activities other than those specified in this Agreement, unless reasonably incidental to the purposes set forth herein.

C. *Other Activities*. Except for those activities set forth herein, each party shall be free to engage in any other activity for its exclusive benefit, provided, however, that any such activity shall be funded exclusively by the party carrying out such activities, and the Corporation shall not be liable for any such funding.

D. *No General Partnership or Agency*. Neither party to this Agreement shall be deemed to be a partner of, or agent for, the other party.

E. *Commencement Date*. The term "Commencement Date" shall mean the date on which the program activities of the Corporation begin. The Commencement Date of the Corporation shall occur on or about January 1, 1995, or on such earlier date as the parties may agree, but the Commencement Date shall not occur until all actions set forth in Schedule "A" appended hereto shall have been completed to the satisfaction of legal counsel for each of the parties. The Board of Directors of the Corporation ("Board") is authorized to take all necessary preliminary actions to prepare the Corporation to do business and to commence program activities prior to the Commencement Date.

3. *Articles of Incorporation*. The parties intend to file Articles of Incorporation not later than June 15, 1994. The

Articles of Incorporation shall contain provisions to provide for the following:

A. The duration of the Corporation shall be perpetual.

B. The number of directors on the Board shall be twenty; ten shall be selected to represent the interests of NDB and ten shall be selected to represent the interests of UDIA.

C. The terms of the directors shall be for one year.

D. The purposes of the Corporation shall be as set forth in paragraph 2.A. hereof.

4. *Place of Business.* The Corporation initially shall have two offices: (1) 2111 Wilson Boulevard, Suite 600, Arlington, Virginia 22201 and (2) O'Hare International Center, 10255 West Higgins Road, Suite 900, Rosemont, Illinois 60018. The Board shall determine which functions of the Corporation are to be carried out in each office, and which are to be carried out in both offices. The Board may relocate, close, or expand said offices, or establish offices in other locations as it so determines. All policies of the Board shall apply to the operations in the two offices and shall be established by the Executive Vice Presidents (defined in paragraph 9.A hereinafter) in consultation with each other.

5. *Governance of the Corporation.* The Corporation will be governed by the Board, which shall be composed of twenty members. Ten members of the Board shall be selected to represent the interests of NDB and ten members of the Board shall be selected to represent the interests of UDIA. The parties agree that all Board

members designated by them will agree to vote for the election as directors of all persons designated by the other as Board members. Each of the persons designated to be a member of the Board shall be a member of the Board of one of the parties. Each member of the Board may be removed by the party having the right to designate such member, and each party shall be responsible for filling vacancies left by those members it has designated.

A. *Majority necessary*. All decisions of the Board must be approved by a majority of directors present at meetings of the Board at which a quorum exists.

B. *Functions of Board*. The Board shall be responsible for overall governance of the Corporation. In addition to those functions required by law, its specific duties shall include, without limitation:

(1) Implementation of a joint planning process;

(2) Development and, following approval by the parties, implementation of an Annual Business Plan and annual Budget for the Corporation;

(3) Management of all funds and assets of the Corporation, and development of all budgets of the Corporation;

(4) Development and approval of joint personnel policies and compensation and benefit programs for employees of Corporation;

(5) Development and approval of by-laws and operating rules for the corporation;

(6) Selection, hiring, firing, and overall management of the officers and employees of the corporation, which authority may be delegated to appropriate corporate officers.

6. *Interim Organizational Management.* Prior to the Commencement Date, the organizational management of the Corporation shall be carried out as follows:

A. *Organizational Management to June 15, 1994.* Upon execution of this Agreement, and until June 15, 1994, the pre-incorporation organizing activities set forth in this Agreement shall be conducted by an Organizing Committee comprised of the Chairman, First Vice Chairman, and Treasurer of UDIA, and the Chairman, Secretary, and Treasurer of NDB (the "Organizing Committee"). The Organizing Committee shall be responsible for carrying out all of the actions necessary to create, qualify, and organize the Corporation pursuant to this Agreement and the laws of the District of Columbia, including hiring employees. The parties will share the expense of the Organizing Committee equally.

B. *Organizational Management from June 15, 1994 to Commencement Date.* Each party shall select its ten members of the Corporation's initial Board of Directors prior to June 15, 1994. The Board shall be responsible for all actions necessary to prepare the Corporation for the commencement of program activities and the Commencement Date pursuant to this Agreement, and it shall be authorized to take such actions as are necessary to carry out its responsibilities, the expenses for which shall be shared equally by the parties. Prior to the Commencement Date, and allowing sufficient time for each of the parties to take appropriate action, the Board will submit to each of

the parties an annual business Plan and Budget for the first year of operations of the Corporation.

C. *Commencement Date and thereafter.* On and after the Commencement Date, the Board will possess all power and authority of the Corporation as set forth in this Agreement.

7. *Annual Budget Development and Allocation.*

A. In developing each Annual Budget, the Board shall allocate its expenditures to the following categories:

(1) *Core Costs.* Core costs shall include the basic cost of salaries and benefits for employees of the Corporation and general administrative costs for the operation of the Corporation, and shall also include the costs of planning activities. Core costs shall not include NDB/USDA direct compliance costs, including without limitation, costs charged by USDA for oversight of NDB.

(2) *Program Costs.* Program costs shall consist of the costs attributable to expenditures, not including core costs, of implementing the programs contained in the annual Business Plan and the annual Budget.

B. *Allocation of costs.* For purposes of fiscal management (paragraph 8 below), all costs incurred by the Corporation under the Annual Business Plan and annual Budget shall be shared equally by the parties, except as otherwise provided herein. The Annual Business Plan and annual Budget may include specific programs jointly undertaken by the Corporation which are not funded equally by the parties. The Annual business Plan and Annual Budget may also include specific identified programs which are to be implemented on behalf of either of

the parties individually. In the event that the annual Business Plan contains such specifically identified joint or individualized programs, the costs for implementing such program, including a *pro rata* portion of core costs and program costs attributable to such individualized programs, shall be allocated to the party on whose behalf such program is to be implemented, or unequally in accordance with the Annual Business Plan and Annual Budget.

8. *Fiscal Management.* The financial affairs of the Corporation shall be overseen by the Board, which may delegate all or any part of such authority to the Executive Vice Presidents or other officers.

A. *Organizing Expenses.* All expenses incurred prior to the Commencement Date by the Organizing Committee and the Board shall be shared equally by the parties to this Agreement, provided, however, that all salaries, benefits, and travel and related expenses incurred in connection with the compensation and reimbursement of individual employees and Board members of the parties assigned to carry out this Agreement shall be paid by the respective party employing such individuals.

B. *Contributions of Parties.* Subject to approval by each of the parties of each Annual Business Plan and Budget, and the budgets therefor, the parties shall be responsible for providing all funding, as contained in the Annual Business Plan and Budget or as otherwise agreed, for the operations of the Corporation on a current basis. Each party will be responsible for an equal share of core costs attributable to the extent that such costs are allocable to joint corporate programs; each party will be responsible for program costs as approved by the respective parties in the Annual Business Plan; and each party will

be responsible for those core and program costs incurred in connection with specific programs identified in the Annual Business Plan and Annual Budget undertaken on behalf of either party individually.

(1) In the event that funds in addition to any approved Annual Budget are required, the parties shall contribute such funds on the same basis in which they are responsible for contributions in the Annual Budget.

(2) In the event that a party does not approve the Annual Business Plan or the Annual Budget, or contribute the required funds in full in a timely fashion, or does not approve any plan or budget for which funds have already been committed or expended, the other party may serve a notice of default upon the non-contributing party. In the event that the default is not cured in full within thirty days of the service of said notice by the non-contributing party, such default, at the option of the non-defaulting party, may be deemed to constitute a notice of dissolution under the terms of paragraph 10. A notice of dissolution based upon such default shall not relieve the non-contributing party from the obligations to contribute its proportionate share for any sums committed or expended, including, without limitation, an equal share of core costs not attributable to specific individually funded programs through the Dissolution Date.

C. *Fiscal Year*. The fiscal year of the Corporation shall be on a calendar year basis unless the Board determines otherwise.

D. *Bank Accounts*. The Board shall designate a bank into which all funds of the Corporation shall be

deposited. The signatures of persons designated by the Board shall be required for all Corporation checks and withdrawals.

E. *Financial Reports.* The Corporation shall prepare an annual financial report to be presented to the parties not later than ninety days following the end of each fiscal year. The Board shall appoint an audit committee comprised of an equal number of representatives of the parties, which shall have regular oversight over the expenditures of the Corporation, and an independent certified public accountant shall annually audit the books of account, records, and financial reports of the Corporation.

9. *Staffing and Employment.*

A. *Executive Vice Presidents.* The initial management of the Corporation shall be directed by two Executive Vice Presidents ("EVP"), one selected by each of the two parties, who shall also provide staff assistance to the Organizing Committee and the Board. The Board shall assume the employment agreements, including benefits, in effect for such individuals; thereafter, the Board shall establish, with the approval of the parties, provisions for the management of the regular operations of the Corporation.

B. *Transfer of Staff.* The Board, prior to the Commencement Date, shall establish policies for the transfer of such staff as it determines will be required for the operations of the Corporation from each of the parties to the Corporation. The Board shall provide for the coordination of compensation, benefits, and other employment policies between the parties in connection with the transfer of staff, and shall develop a uniform salary and benefit

schedule and uniform employment policies. It is recognized that such uniform salaries, benefits and other policies may have to be phased in over time in order to honor existing contracts and other obligations to existing staff. Within the context of existing obligations, the Board shall have the discretion not to transfer all existing staff of the parties to the Corporation, and may approve termination packages to be offered to employees not transferred. It is anticipated that the transfer of staff shall take place on the Commencement Date.

10. *Dissolution of the Corporation.* In addition to provisions for dissolution of the Corporation set forth elsewhere herein, either party may unilaterally cause the dissolution of the Corporation by giving the other party a minimum of one year's advance notice of intended dissolution not later than January 1 of any year, and such notice shall establish a Dissolution Date for January 1 of the following year or such later date as may be agreed. In the event that such notice is given, this Agreement shall continue to operate until the Dissolution Date, during which time the parties shall undertake such actions as are required to separate their respective activities in anticipation of the dissolution of the Corporation. This agreement shall also be dissolved in the event of the dissolution or other termination of existence of either of the parties hereto. A notice of dissolution shall not relieve either party from the obligations to contribute its proportionate share for any sums committed or expended, including, without limitation, an equal share of core costs not attributable to specific programs through the Dissolution Date.

11. *Indemnification of Parties.* Each party shall indemnify and hold harmless the other party for all losses or damages sustained, arising from or caused by any

breach of this Agreement, or any warranty or representation contained herein which is materially incorrect or misleading, or any actions of either party occurring prior to incorporation of the Corporation hereunder.

12. *Subsidiary Organizations.* The Corporation shall be authorized to enter into agreements with the American Dairy Association and the National Dairy Council, subsidiaries of UDIA, for the provision of administrative, financial and program services in connection with this Agreement.

13. *Transfer and Assignment of Existing Contracts and Liabilities.* All contracts of the parties that will be in effect on the Commencement Date will be reviewed by the Board and the respective parties to determine whether they should be assigned to the Corporation or whether they should remain with the original contracting party.

14. *Approvals.* This Agreement is subject to the approval of the Boards of NDB and UDIA, and the Secretary of the United States Department of Agriculture.

15. *Arbitration of Disputes.* In is hereby agreed that any dispute or other controversy between the undersigned in connection with this Agreement shall be submitted to binding arbitration before the American Arbitration Association ("AAA") pursuant to the Commercial Dispute Resolution Rules of the AAA. Arbitration shall be commenced by filing with the AAA by a party, with service on the other party, of a written notice of intent to arbitrate. The arbitration shall then commence pursuant to the rules of the AAA before an arbitration panel of three members selected by the AAA pursuant to its procedures. Any decision of the arbitrator is final, binding, and is not subject to appeal. Such decision may be entered as a

judgment by a court of competent jurisdiction at the request of either party. The parties hereby acknowledge that they are waiving their right to seek remedies in court, including the right to trial by jury, for violations of, or to enforce the terms of, this Agreement.

16. *Notices and Consents.* All notices and consents issued pursuant to this Agreement shall be in writing and shall be served on the other party by hand delivery or certified mail, return receipt requested. If to NDB, said notice or consent shall be delivered or sent to:

Ms. Cynthia Carson
National Dairy Promotion and Research Board
2111 Wilson Boulevard, Suite 600
Arlington, Virginia 22201

If to UDIA, said notice or consent shall be delivered or sent to:

Mr. Thomas Gallagher
United Dairy Industry Association, Inc.
O'Hare International Center
10255 West Higgins Road, Suite 900
Rosemont, Illinois 60018-5616.

The parties may change their addresses for notices and consents by sending such notice of change to the other party pursuant to the requirements of this paragraph.

17. *Modifications and Waivers.* This Agreement constitutes the entire agreement between the parties in relation to the subject matter. No term or provision of this Agreement may be varied, changed, modified, waived or terminated orally, but only by an instrument in writing signed by the party against whom the enforcement of the variation, change, modification, waiver or termination is

sought. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their predecessors, subsidiaries, affiliates, parent companies, successors, successors in interest, assigns, trustees, officers, directors, shareholders, agents, attorneys and employees. Any failure to enforce a term of this Agreement shall not be deemed a waiver thereof.

18. *Further Assurances.* The parties agree to make such further assurances and to execute such additional documents as may be necessary to effectuate this agreement and carry it into effect.

19. *Severability of Provisions.* Any provision of this agreement that is deemed void or unenforceable shall be severed from the balance of the agreement, which remainder shall remain fully binding and enforceable.

20. *Governing Law.* This Agreement shall be governed by and be construed in accordance with the laws of the District of Columbia.

21. *Authority.* All signatory parties hereto represent and warrant that they possess the full and complete authority to covenant and agree as herein provided and further represent and warrant that they have the full and complete authority to execute this Agreement.

22. *Effective Date.* UDIA and NDB agree that this Agreement shall become effective only upon the approval of this Agreement by the United States Department of Agriculture. Such approval shall be evidenced by a separate dated document (which shall become the effective date) stating approval of this Agreement, and such document shall then be attached hereto as Attachment B and incorporated herein.

IN WITNESS WHEREOF, the National Dairy Promotion and Research Board and the United Dairy Industry Association have set their hands and seals on the date first hereinabove mentioned.

ATTEST: NATIONAL DAIRY PROMOTION AND RESEARCH BOARD

/s/ [Illegible] (Seal)

ATTEST: UNITED DAIRY INDUSTRY ASSOCIATION, INC.

/s/ [Illegible] (Seal)

SCHEDULE "A"

1. Approval of Agreement by U.S. Secretary of Agriculture.

2. Qualification of name with state authorities.

3. Preparation and filing of Articles of Incorporation.

4. Tax opinion including tax status of new corporation; statement that new corporation will not impair current tax status of either party; filing of any necessary tax ruling or opinion from Internal Revenue Service.

5. Holding of proper meetings of Corporation Board and adoption of resolutions including:

Election of Officers
Establishment of Bank Accounts
Adoption of Bylaws
Establishment of Committees of the Board
Approval of 1995 Annual Business Plan and Annual Budget
Adoption of Agreements Entered into by Organizing Committee

6. Adoption of required employee benefit plans, employment and employee policies, and preparation for transfer of staff to new corporations.

7. Review of all existing contracts of both parties.

8. Approval of 1995 Annual Business Plan and Annual Budget by both parties and U.S. Department of Agriculture.

9. Satisfactorily address any new legal or procedural issue identified by either party arising subsequent to adoption of this Agreement.

[SEAL] United States
Department of
Agriculture

May 27, 1994

TO: Thomas M. Walsh
Assistant General Counsel
Marketing Division, OGC

THROUGH: Richard M. McKee /s/ Richard McKee
Acting Director
Dairy Division

FROM: Eugene E. Krueger, Head /s/ Eugene E. Krueger
Promotion and Research Staff
Dairy Division

SUBJECT: Contract between the National Dairy Promotion and Research Board (NDB) and the United Dairy Industry Association (UDIA) to Create the Joint Venture Dairy Management, Inc.

ISSUE:

The attached contract between NDB and UDIA is to create a joint venture called Dairy Management, Inc., (DMI). DMI would provide staffing support to both NDB and UDIA.

BACKGROUND:

A lack of generic promotion coordination between the national and State and regional programs has been a regular dairy producer complaint since the beginning of the Dairy Promotion Program. The DMI joint venture (approved by NDB at its March 1994 meeting) is another

in a long series of steps taken by NDB to increase this coordination.

DMI will not be a merger of NDB and UDIA. It will be a merger of their separate staffs into a single staff that serves both organizations. The Dairy Promotion and Research Order (7 CFR 1150) in section 140(c) states that the National Dairy Board has the duty "to appoint or employ such persons as it may deem necessary." It is the duty of NDB and not the Department to establish NDB's staffing needs and organizational structure.

RECOMMENDATION:

That OGC approve the contract to establish DMI

Concurrence: /s/Thomas M. Walsh
Date: 6/7/94

Attachment

The Dairy Producer Checkoff: A $250 Million Business

More than 80,000 dairy producers are the shareholders of the dairy checkoff program, and more than 300 national, state and regional dairy producer board members direct program funds and approve promotion and research programs. The dairy checkoff exists to help increase domestic and international demand for U.S.-produced dairy products.

Checkoff Facts

- Checkoff programs are funded by dairy producers – NOT TAXPAYERS. They are not governmental programs; rather, they are businesses with governmental oversight
- Dairy producers – the shareholders – ultimately determine if the checkoff program is meeting expectations
- More than 300 dairy producer board members represent all dairy producers in directing checkoff funds and approving its programs. They make sure checkoff dollars are strategically invested in the best economic interest of dairy producers
- The dairy checkoff offers producers a positive return on their investment. For every 15 cents per hundredweight dairy producers contribute to the dairy checkoff, they realize a return of 65 cents per hundredweight. *(Source: Cornell University independent economic study published in USDA 2000 Report to Congress)*

- DMI has extensive, board-approved accounting and internal controls to ensure accountability to shareholders
- DMI is accountable to the USDA for all its activities, including program objectives, strategies, services, budgets and accounting procedures
- The dairy checkoff program is independently audited each year to make sure program funds are administered in strict accordance with generally accepted accounting principles. In a 1999 random audit by the General Accounting Office (GAO), the dairy checkoff program received a "clean bill of health" and was among the "cleanest" GAO audits ever
- Dairy producers have the right to ask for a referendum if program effectiveness and efficiency are in question
- The checkoff conducts marketing promotions, product, ingredient and nutrition research, and education programs to help build demand
- The checkoff works with processor organizations to jointly promote fluid milk and conduct projects to improve product, packaging and delivery systems

Dairy Checkoff Works!

- In 2000, total dairy sales increased 2 percent, while total cheese sales increased 3 percent, compared to 1999, according to USDA sales reports

- Per capita dairy consumption also has grown. From 1980 to 2000, per capita total milk consumption grew by nearly 11 percent. Today, the average person consumes more than 584 pounds on a total solid basis, compared to 523 pounds in 1980 *(Source: National Milk Producers Federation)*
- In 1984, there were nearly 20 billion pounds of dairy surplus. Today, even though milk production continues to rise, there is little surplus

Checkoff benefits

Dairy checkoff works . . . for dairy producers

- Increases commodity category sales
- Creates a viable, thriving marketplace for individual businesses
- Provides greater opportunity for brands and businesses to compete for their share of the category
- Protects small producers from being severely disadvantaged against large competitors that could undermine industry growth
- Builds a more favorable economic environment – better prices for producers, more revenue growth for processors

Dairy checkoff works . . . for American consumers

- Reduces dependence on taxpayer dollars for support payments and government administration in times of economic hardship

- Provides an open, free flow of consumer information to help consumers make informed choices about purchasing dairy
- Provides ongoing investments in research to ensure product quality, safety and nutrition expectations